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United States Court of Appeals

For the Second Circuit.

BERTHA BUILDING CORPORATION,
Plaintiff-Appellant,
against
NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

Civil Action No. 12073.

GUMBINER THEATRICAL ENTERPRISES, INC.,
Plaintiff-Appellant,
against
NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

Civil Action No. 12074.

Appendix to Brief for Plaintiffs-Appellants.

On Appeal From the United States District Court for the Eastern District of New York.

THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1958

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Pertinent Docket Entries.

Date	Filings—Proceedings
1951	
Sept. 5	Complaint filed—summons issued.
Sept. 6	Summons returned and filed—served on National Theatres Corp.
Sept. 12	Return from Marshal of Northern District of New York of service of copies of summons and complaint on defendant through Secretary of State.
Sept. 20	Notice of taking deposition filed.
Sept. 20	Notice of motion filed to produce for inspection.

Pertinent Docket Entries

Sept.	20	Notice of motion filed to dismiss.
Sept.	28	Order to show cause filed, for order adjourning taking of deposition (returned 10/3/51).
Oct.	3	Affidavit of Charles F. Young filed in opposition to motion *re* depositions.
Oct.	3	Byers, J. Order to show cause argued and granted on consent. Settle order on notice.
Oct.	4	By Byers, J. Order filed granting motion to take plaintiff's deposition on Nov. 2, 1951.
Nov.	2	Notice of motion filed for production and inspection (returned 11/7/51).
Nov.	27	Notice of motion filed to take testimony by written interrogatories, etc. (Ret. 12/5/51).
Dec.	5	Before Kennedy, J. Motion for order dismissing complaint argued. Decision reserved all papers 12/12/51. Affidavit of Charles F. Young in support filed. Affidavit of Boris Kostelanetz in opposition filed.
Dec.	26	Pro forma answer of National Theatres Corp. filed.

1952

Jan.	4	Note of issue filed.
Feb.	21	By Kennedy, J. Decision rendered denying motion to dismiss the action. (See opinion.)
June	2	Before Kennedy, J. Pre-trial hearing held and continued to June 3, 1952.
June	3	Kennedy, J. Pre-trial continued and closed. Motion by plaintiff to have defendant's deposition taken upon written interrogatories or upon oral deposition in Los Angeles, Cal. Defendant withdraws notice of taking depositions with leave to submit new notice. Plaintiff's motion for inspection under Rule 34 of the Federal Rules of Civil Procedure.

Pertinent Docket Entries

		Motion granted, but inspection to be limited to documents related to theatres in California and covering the period Jan. 1, 1928 to December 13, 1932.
		Motion of defendant for production and inspection under Rule 34 of the Federal Rules of Civil Procedure. The above motion was not opposed.
June	9	Affidavits of Morton H. Randall and Villis G. Randall *re* motion to change place of depositions.
June	26	By Kennedy, J. Order filed denying motion to dismiss complaint, etc.
July	31	Notice of motion filed to vacate plaintiff's notice to take deposition of Robert Gumbiner at Sherman Oaks, California, etc. (Ret. 8/6/52.)
Aug.	4	Before Abruzzo, J. Hearing to vacate plaintiff's notice to take deposition, and order to show cause to stay taking of deposition both argued. Submit order.
Aug.	4	Affidavit in opposition filed.
Aug.	5	By Abruzzo, J. Order filed on above motions.
1953		
July	3	Notice of motion filed for summary judgment, etc. (7/8/53).
July	3	Notice of motion filed issues concerning defense of statute of limitations, etc. (7/8/53).
July	14	Notice of motion filed that Fifth and Sixth defenses, etc. be tried separately (7/22/53).
July	20	Affidavit of John B. Bertero in opposition filed.
Aug.	7	Affidavit in opposition filed.

Pertinent Docket Entries

Aug.	12	Before Rayfiel, J. Notice of motions *re:* Issues concerning 5th and 6th affirmative defenses, issues concerning defense of statute of limitations, and summary judgment for plaintiff argued and decision reserved. All papers by Aug. 31, 1953.
Aug.	17	Request for admissions filed.
Aug.	17	Interrogatories filed.
Aug.	24	By Abruzzo, J. Order to show cause filed to extend time, etc. 8/26/53.
Sept.	1	Reply affidavit of Frederick W. R. Pride filed.
Sept.	25	Notice of motion filed to strike affidavit (9/30/53).
Oct.	9	Rayfiel, J. Motion to strike affidavit argued and denied as indicated. Settle order on notice.
Oct.	21	By Rayfiel, J. Order filed on motion to strike affidavit.

1954

Jan.	18	Answers to interrogatories propounded to defendant filed.
Jan.	18	Answers to requests for admissions filed.
Jan.	18	Answer of Bertha, etc. to the Interrogatories Propounded by Defendant filed.
Feb.	8	Notice of motion filed to strike answer to request, etc.
Feb.	10	Before Abruzzo, J. Hearing on motion for an order directing plaintiff's answers to defendant's requests for admissions be stricken, etc. Respectfully referred to Judge Rayfiel.
Feb.	15	Affidavit of Mr. Rosenberg filed.
Feb.	24	Affidavit of Boris Kostelanetz filed.
Mar.	16	Amended Answers to requests for admissions filed.

Pertinent Docket Entries

Mar.	26	Notice of motion filed to strike amended answers to requests (3/31/54).
Mar.	31	Rayfiel, J. Motion argued. Decision reserved. Affidavit of Boris Kostelanetz filed.
Apr.	5	By Rayfiel, J. Decision rendered on motion to strike plaintiff's amended answers to defendant's requests (see Memo). Settle order on notice.
Apr.	6	By Rayfiel, J. Order filed denying motion to strike amended answers to defendant's requests.
June	10	By Rayfiel, J. Decision rendered on motions (5) pending. Motion denied or granted, etc. as indicated (see opinion). Settle order on notice.
June	25	By Rayfiel, J. Supplemental memorandum filed (see opinion book).
June	25	By Rayfiel, J. Order filed denying motion for summary judgment dismissing 5th and 6th separate defenses.
June	25	By Rayfiel, J. Order filed denying motion to try 5th and 6th defenses separately.
June	25	By Rayfiel, J. Order filed that defense of statute of limitations in defendant's answer be tried separately, the case to be placed at the foot of non-jury calendar for October 1954.
Oct.	27	Notice of motion filed limiting information requested in all interrogatories, etc.
Nov.	10	Interrogatories propounded to defendant filed.
Nov.	10	Affidavit of Francis J. Mulderig filed.
Nov.	10	Galston, J. Motion for an order limiting the information requested in all interrogatories, etc. Motion argued and submitted.

Pertinent Docket Entries

Nov.	19	By Galston, J. Decision rendered on motion limiting information, etc. See opinion filed in case No. 12074.
1955		
Feb.	14	Answers to interrogatories filed.
Apr.	18	Notice of motion filed to strike out Interrogatories.
Apr.	20	Affidavit in opposition filed.
Apr.	20	Inch, J. Hearing on motion to strike interrogatories argued and submitted.
Apr.	25	Affidavit of Charles F. Young filed.
Apr.	25	Notice of motion filed for production and inspection.
Apr.	27	Before Inch, J. Hearing on motion for production, etc. Motion argued and submitted.
May	4	Affidavit of Francis J. Mulderig filed.
May	4	Affidavit of Charles F. Young filed.
May	16	By Inch, J. Decision on motion to answer Interrogatories and produce. Granted and Denied as indicated. See opinion. Submit order.
May	20	Notice of taking deposition filed.
May	20	Notice of motion to vacate taking of deposition filed.
May	23	By Galston, J. Order filed staying deposition, etc.
May	24	By Inch, J. Order on motion to answer interrogatories and production.
May	25	Affidavit of Boris Kostelanetz filed.
May	25	Galston, J. Hearing on motion to vacate notice to take deposition argued and submitted.
May	26	Affidavit of Boris Kostelanetz filed. Affidavit of Francis J. Mulderig filed.
June	9	By Galston, J. Decision on motion to vacate notices, etc. Granted. See memo. Settle order.

Pertinent Docket Entries

June 15 By Galston, J. Order filed on motion to vacate notice.

Dec. 12 Galston, J. Trial began. Continued to Dec. 13.

Dec. 13 Galston, J. Trial resumed. Continued to Dec. 14.

Dec. 14 Galston, J. Trial resumed. Continued to Dec. 15.

Dec. 15 Galston, J. Trial resumed. Continued to Dec. 16.

Dec. 16 Galston, J. Trial concluded. Decision reserved. File all papers Jan. 31, 1956 with findings of fact and conclusions of law.

1956

Feb. 20 Before Galston, J. Hearing to reopen held and concluded.

Mar. 28 By Galston, J. Decision rendered on above trial. Complaint is dismissed. Settle order. See opinion and Findings of Fact and Conclusions of Law filed.

Apr. 12 Bill of costs filed. Costs taxed and docketed against plaintiff in the sum of $468.13.

Apr. 16 By Galston, J. Order filed (on decision) dismissing complaint with costs of $468.13, etc.

May 2 Notice of appeal and bond filed. Copy mailed to attorneys for defendant. Notice *re:* record given to attorney.

May 18 By Galston, J. Order filed and affidavit extending time to file record on appeal to July 31, 1956.

July 16 Transcript of record in 2 volumes filed.

July 24 By Abruzzo, J. Order filed correcting stenographer's transcript.

Notice of Motion to Try Separately Issues Raised by the Defense of Statute of Limitations.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

BERTHA BUILDING CORPORATION,
Plaintiff,
against
NATIONAL THEATRES CORPORATION,
Defendant.
Civil Action No. 12073.

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Nick Spanos, Esq., sworn to the 1st day of July, 1953, the complaint and answer herein and all the proceedings heretofore had in this case, the undersigned will move this Court at a motion term to be held at the United States Court House, 271 Washington Street, Brooklyn, N. Y., on July 8th, 1953, at 10:00 A. M., or as soon thereafter as counsel may be heard, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, for an order directing that the issues concerning the defense of the Statute of Limitations, contained in defendant's answer, be tried separately at the October Term, 1953, by court and jury, and for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, all affidavits in opposition to this motion must be served upon

Notice of Motion to Try Separately Issues Raised by the Defense of Statute of Limitations

the undersigned attorneys for the plaintiff not later than one day prior to the hearing on this matter.

Dated: New York, N. Y., July 1, 1953.

Yours, etc.,

CORCORAN & KOSTELANETZ
By /s/ BORIS KOSTELANETZ
Boris Kostelanetz
A Member of the Firm
Attorneys for Plaintiff

To:

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY, Esqs.
Attorneys for National Theatres Corporation

• Identical Notice of Motion filed in Civil Action No. 12074.

Counter-Order Submitted *re* Separate Trial of Issues Raised by the Defense of the Statute of Limitations.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Upon reading and filing plaintiff's notice of motion, dated July 1, 1953, for an order directing that the issues concerning the defense of the statute of limitations, contained in defendant's answer, be tried separately by court and jury, and the affidavit of Nick Spanos, sworn to July 1, 1953, in support thereof, and having heard Boris Kostelanetz, Esq., in support thereof, and Frederick W. R. Pride, Esq., in support of a motion for a separate trial on the issues of statute of limitations before the Court alone, it is

ORDERED, ADJUDGED AND DECREED that the motion be and the same hereby is granted, and that the issues raised by the defense of statute of limitations contained in defendant's answer be tried separately before court and jury on the first Monday of the October 1954 term.

Dated: Brooklyn, New York, June , 1954.

United States District Judge

• Identical Counter-Order submitted Civil Action 12074.

Order Directing Separate Trial of Issues Raised by Defense of Statute of Limitations.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Order.

Plaintiff herein having moved this Court pursuant to Rule 42 (b) of the Federal Rules of Civil Procedure for an order directing that the issues concerning the defense of the statute of limitations contained in defendant's answer be tried separately by the Court and a jury and the defendant having consented to a trial of such issues to the Court alone and it appearing to the Court that such issues should be separately tried to the Court alone, it is

ORDERED, ADJUDGED and DECREED that the defense of the statute of limitations contained in defendant's answer be tried separately to the Court without a jury, the case to be placed at the foot of the Civil Non-Jury Calendar for October, 1954.

Dated: Brooklyn, New York, June 25th, 1954.

/s/ LEO F. RAYFIEL
United States District Judge

---

* Identical order entered Civil Action No. 12074.

Opinion on Motion for Separate Trial of Issues Raised by Defense of Statute of Limitations.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE BOTH ACTIONS.]

Appearances:

Corcoran & Kostelanetz, Attorneys for Plaintiff, by Boris Kostelanetz, Esq., for the motion. Dwight, Royall, Harris, Koegel & Caskey, Attorneys for National Theaters Corp. by Frederick W. R. Pride, in opposition.

RAYFIEL, J.:

The plaintiffs move, in each of the above actions, for summary judgment, dismissing the fifth and sixth separate defenses contained in the defendant's answers. They also move for a separate trial by jury of the issues raised by the defense which pleads the Statutes of Limitations, which motion is unopposed.

The defendant moves, in each case, for a separate trial by the Court, without a jury, of the issues raised by the aforementioned fifth and sixth affirmative defenses.

The plaintiffs sue herein for treble damages sustained by reason of the defendant's alleged violation of the Anti-Trust Laws. The defendant, in its answers in both actions, offers certain affirmative defenses: the "fifth" such defense pleads a general release executed by J. L. Gumbiner, the then president of both plaintiff corporations, on May 25, 1935, and the "sixth" pleads "*res adjudicata*," in the form of a stipulation providing for the dismissal, with prejudice, of an action in the United States District Court for the Southern District of California, entitled "H. L. Gumbiner, plaintiff, v. Fox West Coast Studios and Others, defendants," which was executed by H. L.

Opinion on Motion for Separate Trial of Issues Raised by Defense of Statute of Limitations

Gumbiner, then president of the plaintiff corporations, on June 3, 1935, and entered in that Court.

Both plaintiffs and the defendant have submitted voluminous affidavits, exhibits, and memoranda to support their respective contentions. The defendant argues that each of the corporate plaintiffs is the alter ego of H. L. Gumbiner, who was the president and sole or controlling stockholder of both corporations, and who in 1935 brought an action in California for the same relief herein sought. That action was settled, as evidenced by the aforementioned general release and stipulation of dismissal, with prejudice, which are pleaded in the fifth and sixth affirmative defenses.

The plaintiffs disagree, and contend that the said release and stipulation cannot bind them since the parties in these actions are not identical with those in the California action.

I have read the complaint in the California case which, like the cases at bar, was for treble damages under the Anti-Trust Laws. It contains an allegation in paragraph numbered X thereof, to the effect that the plaintiff in that case, H. L. Gumbiner, operated, between January 30, 1931, and December 8, 1931, the Los Angeles, the Cameo and the Tower Theaters, all in Los Angeles, California, and that because of certain illegal and monopolistic acts on the part of the defendants he suffered damage for which he brought the said action.

The complaints in the cases at bar allege that Gumbiner Theatrical Enterprises, Inc., between January 30, 1931, and December 8, 1931, owned and operated the Los Angeles Theater, in Los Angeles, California, and that Bertha Building Corporation, between October 1, 1927, and July 4, 1935, owned and operated the Tower Theater, in Los Angeles, California, and that because of various illegal acts and monopolistic practices by the defendant

and others they suffered damages for which the instant actions were brought.

It would appear, therefore, that the complaints in the cases at bar seek the same relief as that prayed for in the complaint in the California case, except that the claim of the Cameo Theater is omitted from the present complaints.

It is unnecessary to cite authority for the rule that motions for summary judgment will be granted only when there is no triable issue of fact. In my opinion the motions in these cases do not meet this test, and there must be a trial of the issues raised by the fifth and sixth affirmative defenses. Accordingly, the motions for summary judgment are denied.

We now come to the consideration of the defendant's motions under Rule 42(b) of the Federal Rules of Civil Procedure for an order directing that the issues raised by the fifth and sixth affirmative defenses be tried separately by the Court alone. Rule 42(b) provides that "The Court in *furtherance of convenience or to avoid prejudice* may order a separate trial" etc. (italics added). In my opinion a showing of neither of such purposes was made here. The issues raised by the fifth and sixth affirmative defenses can be tried with the rest of the issues raised by the pleadings without resultant inconvenience or prejudice to the defendant. The defendant's motions are therefore denied.

There being no opposition to the plaintiff's motion for a separate trial by the court and jury of the issues raised by the defense of Statute of Limitations, that motion is granted.

Settle order on notice.

Dated: June 10, 1954.

United States District Judge

[2-10] The Clerk: Bertha Building Corporation against National Theatres Corporation, and Gumbiner Theatrical Enterprises against National Theatres Corporation, case on trial.

The Court: I would like to have Judge Rayfiel's order.

Mr. Pride: Oh, yes.

The Court: I understand from this order dated June 25, 1954, of Judge Rayfiel, that the issue raised by the defendant of the Statute of Limitations is to be tried now without a jury.

Furthermore, that since that time there was a motion made by the defendant for summary judgment—

Mr. Pride: Or judgment on the pleadings, sir.

The Court: I don't understand that that is properly before me.

Mr. Pride: May I address myself to that point?

The Court: I think that motion should be referred to the motion part.

Mr. Pride: May I be heard on that?

The Court: Yes.

Mr. Pride: As we indicated to your Honor in chambers a couple of weeks ago, we were making the motion to which you have just referred, namely, for judgment on the ground that it appears on the face of the pleadings that the bar of the Statute of Limitations [11] requires the dismissal of these actions.

Now, when Judge Rayfiel ordered this separate trial, it appeared to us, your Honor, that many of the same basic questions of law which were to be determinative of these Statute of Limitations questions would apply with respect to this motion for judgment on the pleadings with equal force and effect as they would to the issues which might be tried, in the sense that evidence might be required, in the event that our motion was decided adversely.

Therefore, your Honor, we didn't present this motion for judgment on the pleadings in the motion part, believ-

ing, and I submit that I believe the rule so indicates, that this motion is one which probably may be made at any time, so long as, of course, it does not unduly delay the trial of the case.

As we indicated before your Honor in Chambers, when you said that this point should be urged at the time the case is set for trial, as we said then of course we would be prepared to proceed with the trial in the event that you felt that the motion could not be decided forthwith, or that you wished to take it under advisement.

I submit, your Honor, that this position which we take here, and which we earnestly contend, is determinative [12] of this matter of the Statute of Limitations, and is one which if it can have that effect should be heard and thus eliminate the use of the time of the Court and of the parties with respect to evidence if that not be necessary.

I should also say, your Honor, in part we had in mind one further factor: It is our position here that this point which we make, that is that judgment on the pleadings is required, has been authoritatively settled in the District Court of the United States for California.

The Court: I don't want to hear argument on the merits of this motion.

Mr. Pride: I am just saying why it was in our mind that the motion should not be brought on before any Judge other than the Judge who tried the case.

The Court: But that is just the point. I am confronted with a mongrel practice because I am not trying the case, I am trying this specific issue, and there is nothing in that order which would enable me, as I read the order, to pass on the end motion.

A motion for judgment on the pleadings or for summary judgment, certainly may be raised at any time, but not at a time such as this, where there is a specific direction of a Judge of this Court to try a single issue.

[13] What you argued a moment ago, I agree with entirely; at the trial of the case you may bring up your judgment, your motion for summary judgment. This isn't, however, a trial of the case.

Mr. Pride: No, no, it is a trial of a specific issue, your Honor, and I submit that if in connection with the trial of that issue, if it appears that at any time from any source, the pleadings or the evidence, that the issue as a matter of law must be determined in the defendant's favor, then I feel that your Honor—

The Court: Then you are not pressing the point that this motion should precede the trial of the issue of the Statute of Limitations?

Mr. Pride: I am, your Honor, I feel—

The Court: Then I deny that because it is improperly presented.

If you want to try that issue, I will refer you to the motion part.

Now, if during the trial of the issue that is referred to me, there arises parenthetically the question of whether the complaint is sufficient, well, that is all right, I will have to consider that; but I shall not consider an independent motion for summary judgment on the pleadings.

• • • • • • •

[15] The Court: I shall not pass on the sufficiency of this complaint at this time, and the reason for it is that order of Judge Rayfiel.

Mr. Pride: Well, your Honor, I don't wish to labor the point since your Honor has considered it and has expressed himself on it. I do submit to you that as in the trial of any case or with respect to the trial of any issue—

The Court: Don't repeat that argument, I know that in the trial of the case you may bring that, but this isn't the trial of the case, and I regret very much that it isn't.

I don't view with any feeling of enthusiasm the trial of this separate issue, and I am not inexperienced in this field.

• • • • • • •

The Court: You could have moved for any Wednesday [16] since this case has been at issue or since the complaint was filed for the relief that you now want me to give you, preliminarily to what I am authorized to do under the order of Judge Rayfiel.

I think that ought to be so clear that we should not have to waste any more time debating it.

• • • • • • •

[18] Mr. Kostelanetz: If your Honor please, I have an application to make which I state to your Honor frankly I am making for the record only.

Judge Rayfiel, in whom we have immense respect, has ordered a trial without a jury here. We think that Judge Rayfiel's order in that respect is not correct, but nevertheless it is the law of the case. So, to the extent that I may be saying, and not to waive our original point, may I simply renew for the record a request for a jury trial?

The Court: You cannot renew before me; I won't entertain it.

• • • • • • •

[19] Mr. Kostelanetz: Now, if your Honor pleases, as I understand it, in a suit of this kind involving this issue, the plaintiff should go forward and make some showing of the tolling of limitation, and then to extend it to the defendant to carry it on affirmatively, to carry the burden of the case.

For that purpose, if your Honor pleases, the [20] plaintiff will now proceed to make some showing in the record, your Honor.

• • • • • • •

Mr. Kostelanetz: If your Honor please, it is admitted in the pleadings that the defendant is a Delaware corporation. It is admitted in the interrogatories.

In any event, I wish to offer, your Honor, as Exhibits 1 and 2, respectively, certified copies of the records of the Department of State of New York as to the date when National Theatres Corporation came into New York, to wit, December 16, 1949, and as to the date when National Theatres Corporation, formerly known as WESCO, came into California, to wit, September 29, 1952.

Mr. Pride: I take it, Mr. Kostelanetz, that these are certificates with reference to the qualifications of that company to do business in these two states?

Mr. Kostelanetz: Whatever the law requires, yes.

Mr. Pride: Yes, I simply made that observation with respect to your statement that they reflect when [21] it came into the state; rather, it shows when it qualified to do business.

Mr. Kostelanetz: I will accept that, your Honor, that is correct.

Mr. Pride: I have no objection.

(Certificate of authority as of the 16th day of December, 1949, issued by Department of State, State of New York, received in evidence as Plaintiffs' Exhibit 1, as of this date.)

(Document issued by State of California, office of the Secretary of State, Sacramento, received in evidence as Plaintiffs' Exhibit 2, as of this date.)

Mr. Kostelanetz: Now, if your Honor please, I have chronological files of certain prior litigation in which representations were made to the Court concerning the whereabouts of National Theatres, both in California and in New York.

With the Court's permission, and to save the Court's time in reading these exhibits, I would like to offer for identification with the exhibit a paper which we can call,

let us say, 3X or 4X. As I say, this is merely to save the Court's eyes. This points up the specific paragraph which the Court may desire to examine. The identical papers are in my trial brief and were served on the other side. As I say, it may very well be [22] that the Court may, and this is just for facilitation purposes and to save its eyes, may wish to have the paper marked as an exhibit for identification, having the basic number as the exhibit offered.

Mr. Pride: This is the subject of introduction of what apparently are certain papers from other litigations in which—

Mr. Kostelanetz: Certified and exemplified copies.

• • • • • • •

[25] The Court: I think I will permit it.

You are objecting to the admission?

Mr. Pride: Yes.

The Court: That is of this offered exhibit?

Mr. Pride: Yes.

The Court: I will overrule your objection, subject to connection that that time was relevant.

Mr. Pride: Yes, your Honor.

Could I also ask your Honor, so that the record may be complete here, that is with respect to any evidence of this sort, that Mr. Kostelanetz indicate what disposition was made of the motion, or if a defense was pleaded.

Mr. Kostelanetz: That is part of his case, your [26] Honor.

Mr. Pride: Very well.

The Court: I don't see the necessity; if he wants to do it, he may.

Mr. Pride: Very well. I thought it would be better for continuity.

The Court: No.

The point you offered it for, Mr. Kostelanetz, in order to show that at one time, particularly in that 1932 litiga-

tion, the defendant in effect said it was not doing business in California.

Mr. Kostelanetz: Of any kind at all, and this was a judicial representation.

The Court: A judicial representation in California; is that right?

Mr. Kostelanetz: Yes, your Honor.

The Court: That is the basis of your offer?

Mr. Kostelanetz: Yes, your Honor.

The Court: I will receive it. It will not have weight if after it appears that the evidence offered makes the critical period three years prior to July, 1938.

Is that right, Mr. Pride?

Mr. Pride: Yes.

Mr. Kostelanetz: May I say 1932 is also a critical [27] period, and this entire period—

Mr. Pride: 1938, I think, was the date.

The Court: Yes, 1938.

Mr. Pride: In connection with materiality, you have adverted to this one factor. There is also the additional point that these are formal motions and formal pleadings and so forth. The effect which they have, of course, is dependent in large measure upon what position the defendant took in respect of all of these lawsuits. In other words, where despite the fact of the taking of the formal position, the defendant, when the case came down for disposition, abandoned these defenses and appeared and answered and defended in the actions—

Mr. Kostelanetz: I don't think—I think, Mr. Pride, this is all part of your case.

Mr. Pride: Very well, very well.

Mr. Kostelanetz: I will proceed.

The Court: That exhibit will be received.

(In the Matter of Jensen and Von Herberg versus WESCO Corporation, etc., Notice of Special Appearance

and Motion to Quash Service of Summons received in evidence as Plaintiffs' Exhibit 3, as of this date.)

Mr. Kostelanetz: Now, if your Honor pleases, Mr. Pride has no objection to making it easier for the [28] Court to have this annexed to Exhibit 3, that is to annex Exhibit 3X for identification.

Mr. Pride: Yes, your Honor, I have no objection.

That is subject to correction, of course—

Mr. Kostelanetz: Of course it is.

Your Honor, these are merely quotations which we thought relevant.

Would your Honor permit me to read at this time the relevant portions of this exhibit?

The Court: Certainly.

Mr. Kostelanetz: Thank you.

Plaintiffs' Exhibit 3, your Honor, is a Notice of Special Appearance and Motion to Quash Service of Summons in a case entitled Jensen against WESCO Corporation.

WESCO Corporation is, of course, a predecessor, by name only; it is the same company as National Theatres.

Now, the motion papers are signed by three attorneys for the WESCO Corporation, and the specific affidavit of L. A. Woolams, a vice president of WESCO Corporation, states, referring to a period from March 19, 1926, to September 26, 1932, as follows:

"That at all times hereinafter mentioned, and particularly on September 26, 1932, and at the time of the [29] alleged service of the summons in the above entitled action upon affiant, said WESCO Corporation was not qualified to conduct any business in the State of California and did not conduct any business therein;

"That at the time of the alleged service of summons and for many months immediately prior thereto, and particularly on the said 26th day of September, 1932, the principal office for the transaction of business by WESCO

Corporation was and is now maintained at No. 444 West 56th Street, in the City of New York, State of New York; that during all of the said times the only other office maintained by the said WESCO Corporation for the transaction of business or otherwise was and is maintained in the State of Delaware, and that during said times said WESCO Corporation never had and does not now have an office of any kind in the State of California;

"That during all of said times none of the corporate records, *books of account of* WESCO Corporation, and none of its papers and documents relating to its business were, and none now are, located in the said States;

"That during all of said times said WESCO Corporation did not own and does not now own or use or control any property, real or personal, in the said State of California; that during said times it did not have nor does [30] it now have any employee or employees or managing agent or any other person located in the State of California; that during said times no employee or employees, or agent or agents, or representative or representatives of said WESCO Corporation transacted or engaged in or did any business in the State of California for or on behalf of said corporation;

"That during said times said corporation did not have nor does it now have any bank account or bank accounts in the said State of California; and said corporation was not engaged and is not now engaged in doing any business of any sort or nature in said State;

"That said WESCO Corporation has not designated any statutory agent or representative or other person upon whom process may be served in the State of California; that during said times affiant was and is now an officer, to wit, a Vice President of Fox Film Corporation, a New York corporation, and was and now is a director and also an officer, to wit, a Vice President of Fox West Coast Theatres, a California corporation, both of which

corporations during said times were and now are qualified to do business and doing business in the said State of California; that during said times all of affiant's activities in the said State were and are for and on behalf of either [31] Fox Film Corporation or said Fox West Coast Theatres, and that during said times none of his activities were and they are not now for or on behalf of said WESCO Corporation, and that during said times he did not transact nor does he now transact any business in the said State for or on behalf of said WESCO Corporation;

"That during said times no meeting or meetings of the Board of Directors and no meeting or meetings of the stockholders of said WESCO Corporation were held in the State of California or elsewhere except in the said State of New York."

Now, this, your Honor, is Exhibit 3. I did not read the covering motion papers, I just read the affidavit.

• • • • • • •

[32] Now, your Honor, I offer as Exhibit 4 papers in Marjorie Palmer versus Wesco Corporation, Supreme Court of the State of New York, County of New York, filed March 18, 1935.

Your Honor, this is the same case as Exhibit No. 3, except the title of the plaintiff was changed, it became Marjorie Palmer versus Wesco Corporation, and again I have the addendum which I referred to previously.

Mr. Pride: Your Honor, with respect to this particular document, and in line with your Honor's ruling as to admissibility, I submit that this is of a somewhat different nature than the affidavit which has been submitted in the prior exhibit. In other words, this exhibit, apparently, is an answer, it is in the pleadings of the case and is an answer in which an allegation is made that the defendant National Theatres was without knowledge or information sufficient to form a belief as to whether it was doing business in New York.

I submit, your Honor, that such a statement in a formal pleading, in litigation, is of no significance with respect to the facts relating to the doing of [33] business.

The Court: I take it that the offer is made for the purpose of showing an admission, something that was said by the defendant which is in contradiction of or inconsistent with its present position.

Mr. Kostelanetz: It certainly is, your Honor.

Mr. Pride: I submit a formal statement in an answer saying that the man who signed the answer, a layman, is without knowledge or information sufficient to form a belief as to whether the legal conclusion that National was doing business in New York was true or not, is an admission of nothing.

The Court: Well, I will overrule the objection.

Mr. Pride: Very well.

(Papers in case of Marjorie Palmer against Wesco Corporation, filed March 18, 1935, received in evidence as Plaintiffs' Exhibit No. 4.)

Mr. Pride: Your Honor, there is the further paper here, apparently an affidavit was submitted in connection with a motion for a bill of particulars, and I refer to it because of my suggestion heretofore that the disposition of these cases, if stated on the record when they are referred to, would help the continuity of this, in other words—

[34] The Court: You are not prevented from offering that, if you wish.

Mr. Pride: Oh, no, oh, no. I will.

The reason I mentioned it here is that there is a statement made, an affidavit in this New York case, which could be interpreted as indicating that the point at issue was actually litigated in the California case, which is not the fact. In the California litigation, which was the other one, the case was transferred to New York, and this is the case that was transferred to New York.

The Court: I don't like to keep repeating my conclusion with respect to these exhibits, but the point of admission concerns merely the matter of whether anything said therein on behalf of the defendants and with its authority is inconsistent with i's present position.

Mr. Pride: I understand, your Honor.

The Court: All right.

We will take a ten-minute recess.

Mr. Kostelanetz: Your Honor, the excerpt to which I respectfully call the Court's attention in Plaintiffs' Exhibit 4 is the allegation which consists, your Honor, of an affidavit of Spyros Skouras, president of defendant [35] company, and of a complaint and answer in the case of Marjorie Palmer against Wesco Corporation.

In the complaint, your Honor, it is alleged by Marjorie Palmer, the plaintiff:

"That at all times herein stated the defendant, Wesco Corporation, was and now is a corporation organized and existing under the laws of the State of Delaware, and on information and belief, is doing business within the State of New York."

Now, your Honor, the answer of Mr. Skouras of National Theatres was:

"Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraphs numbered • • •."

That, your Honor, is the paragraph which I just read, concerning National Theatres doing business.

Now, if your Honor pleases, I respectfully offer certified copies of papers from the United States District Court for the Southern District of New York in an action entitled Hillside Amusement Company versus Warner Brothers Pictures, Incorporated, *et al.*, which action was filed February 24, 1941.

The paper involved would be the order to show cause, [36] signed by Judge Clancy on the affidavit of John P. Edmondson, Secretary of the Company, affidavit of William W. Owens, a member of the firm of Dwight, Harris, Koegel & Caskey, counsel for the company, and affidavit of H. C. Cox, treasurer of National Theatres Corporation, which refers to the affidavits of Edmondson and Owens; an opinion of the late Judge Hulbert with regard to the motion; and the answer filed by the defendants in answer to the supplemental complaint of February 23, 1945, and the amended complaint filed April 16, 1945.

That is all, your Honor, a part of my offer of the proposed Exhibit 5.

The Court: What is the relevancy of that?

Mr. Kostelanetz: If your Honor pleases, this Hillside Amusement Company case was an antitrust action, and the defendant National Theatres was served with process.

The Court: Are they named as a party?

Mr. Kostelanetz: Yes, your Honor, yes, sir.

The Court: What is the title of the action?

Mr. Kostelanetz: It is Hillside Amusement Company against Warner Brothers Pictures, Incorporated, and others. There were a large number of defendants.

I am sorry if I misled the Court.

[37] The Court: They were one of the others?

Mr. Kostelanetz: Oh, yes, yes, your Honor.

The Court: What is the date of that?

Mr. Kostelanetz: This action started February 24, 1941, your Honor, and the statements in the papers relate to activities, as we see it, all the way back of February, 1941,

and in fact in supplemental complaints carried forward up to 1945.

Perhaps if I may refer to the papers more specifically, your Honor, I am quite sure that I will be making myself clear.

Here the defendants obtained an order to show cause from Judge Clancy sitting in the Southern District on the affidavit of their secretary, John Edmondson. He desired to get an order to show cause—

The Court: Pardon me for interrupting, Mr. Kostelanetz.

The objective that I thought you were seeking to establish in offering Exhibits 3 and 4 was to make it appear that there were inconsistent statements made with the defendant's present position.

Mr. Kostelanetz: Yes, your Honor.

The Court: That is in respect to the defense of the Statute of Limitations.

[38] Now, what you now offer would be admissible under that rule if there are such inconsistent positions asserted.

Mr. Kostelanetz: Yes, your Honor.

The Court: Please read me some of them.

Mr. Kostelanetz: Very good.

The affidavit which was presented to Judge Clancy says:

"That this Court is without jurisdiction over National Theatres Corporation;

"That this Court is without proper venue in said action as to National Theatres Corporation.

"That National Theatres Corporation is not an inhabitant within the territorial jurisdiction of the District Court of the United States for the Southern District of New York, may not be found within said District and does not transact any business within said district."

Your Honor, that is Mr. Edmondson's affidavit, the secretary of the company.

It continues, a further affidavit:

"National Theatres Corporation is a Delaware corporation. Its principal place of business is 2854 Hudson Boulevard, Jersey City, New Jersey. [39] National Theatres Corporation does not maintain an office in the territorial jurisdiction of the Southern District of New York. National Theatres Corporation is a holding company. It engages in no business other than holding stock and other securities. All securities owned by it are kept in vaults in Jersey City, New Jersey. It maintains an office in Jersey City, New Jersey, at which all directors' meetings, stockholders' meetings and meetings of the auditing committee are held. Its stock record books are kept in Jersey City, New Jersey.

"I have an office at 444 West 56th Street, New York, N. Y., where the summons and complaint were purportedly served upon me. That office is not the office of National Theatres Corporation. National Theatres Corporation does not own the building and it does not pay the rent. The office is maintained by Twentieth Century-Fox Film Corporation, of which I am an assistant secretary. I transact no business for National Theatres Corporation in the Southern District of New York.

"None of the officers, directors, or employees of National Theatres Corporation maintains an office [40] as an officer, director or employee of National Theatres Corporation in the Southern District of New York. None of the officers, directors or employees of National Theatres Corporation transacts any business on behalf of National Theatres Corporation in the Southern District of New York.

"National Theatres Corporation is not qualified to do business in the State of New York.

"National Theatres Corporation does not maintain an office of any sort in New York, N. Y., or anywhere else

within the territorial jurisdiction of the District Court of the United States for the Southern District of New York. At all times since December 29, 1934, the principal office of National Theatres Corporation has been in Jersey City, New Jersey. No meetings of stockholders, directors, or of the auditing committee are held in the Southern District of New York."

The Court: Let me ask you, Mr. Kostelanetz, you have read enough about that: Is there anything in this proposed exhibit relating to doing business in California?

Mr. Kostelanetz: This exhibit, your Honor, is on New York.

The Court: Solely on New York?

[41] Mr. Kostelanetz: This exhibit is litigation in New York and solely on New York, your Honor.

The Court: Do you want to say anything about that?

Mr. Pride: Simply as your Honor has pointed out, this is in 1941, which is three years after the significant period of 1938.

The Court: Yes, that is the way my inclination would be, to exclude it; however, I am going to admit it in case there is an appeal and the Court will then have the papers.

Mr. Kostelanetz: If your Honor pleases, while the papers are still in front of you, your Honor, may I suggest and draw to your attention the statement of Mr. Edmondson that "Since December 29, 1934, the principal office of National Theatres has been in Jersey City, New Jersey."

The Court: That doesn't prevent the defendant from having done business within the limitations of the Anti-trust Act, within California.

Mr. Kostelanetz: Yes, your Honor.

Your Honor, we are presenting separate litigated papers for both New York and California.

As I understand their position, they say that if they had done business in New York during this period, [42] then we are supposed to be out of court. In other words, the barring—

The Court: But they don't reach that position, if their position in respect to doing business in California is sound, they don't have to reach the New York position.

Isn't that your position, Mr. Pride?

Mr. Pride: That is right, your Honor.

We are contending that the six-year statute of New York was effective in the period prior to 1938, and the company did business here. Of course, as we present our evidence, we will have to present it as to both jurisdictions, because the same witnesses, in part, will be involved. But, we say as to National Theatres, it did business continuously within the meaning of Section 12 of the Clayton Act, continuously for more than six years prior to 1938 in New York, and that the action is barred in New York.

We further say that in that same period it did business continuously for more than three years prior to 1938 in California, under Section 12, and it is barred there.

The Court: All right.

Mr. Pride: As to this affidavit, as your Honor [43] has indicated, it speaks as of the date 1941. The reference that the principal office of the company was not in New York, as your Honor has indicated, of course has no bearing on whether it was doing business.

Mr. Kostelanetz: If your Honor pleases, I am rather glad, with the papers in front of us and Mr. Pride's statement just now, that is concerning National and its relation to doing business in New York, with that in mind, your Honor, I would like to, with your Honor's permission, to continue and just read Paragraph 12.

Mr. Edmondson says—this is in 1941:

"I have consulted the General Counsel for National Theatres Corporation, Messrs. Dwight, Harris, Koegel &

Caskey, No. 100 Broadway, New York, N. Y., and have been advised by them that in their opinion National Theatres Corporation does not transact business within the territorial jurisdiction of the District Court of the United States for the Southern District of New York; and that it is not an inhabitant nor can it be found within the territorial jurisdiction of said court."

May I continue, your Honor?

The Court: Well, I think you don't need to read [44] material that is only repetitious of the position that you say is outlined in that affidavit.

Mr. Kostelanetz: Yes, your Honor.

Well, may I say then that the next affidavit, your Honor, the Owens affidavit, contains similar material, except that he fixes his first knowledge as June 10, 1937.

Mr. Edmondson in another affidavit says that what Mr. Owens said in his affidavit is true.

Then, in the answer—

The Court: Of course, Mr. Kostelanetz, don't lose sight of the fact that the plaintiffs in the pending action here are not involved in any way in the action in New York—is that so?

Mr. Kostelanetz: We are not involved in the Hillside Amusement action, your Honor.

The Court: No.

Now, if the alleged wrongful acts of the defendant in respect to the two plaintiffs in these actions, those allegations relate to alleged violations of the antitrust act in the State of California—do they?

Mr. Kostelanetz: Yes, sir, that is true.

The Court: If then the Statute of Limitations had run in California against those alleged wrongdoings, [45] jurisdiction could not be revived by reason of the fact that the National even took a different position in a later litigation here in New York, in a suit not involving those defendants.

Mr. Kostelanetz: Your Honor, I think so that I may make our position clear, as we understand, and for that matter as we understand the defendant's position, the Statute of Limitations had to toll both in California and in New York during this period. Of course, we have to make—well, it is not just California alone which may bar the action, but in addition to tolling in California, we, as part of our showing, will show your Honor that there has been a tolling in New York as well.

The Court: How could there be a tolling of alleged wrongful acts of this defendant against the two named plaintiffs it the Statute of Limitations had been effective before the New York action was initiated?

Mr. Kostelanetz: I appreciate your Honor's question.

If there was no tolling in California, for instance, then of course the question of what the New York Statute of Limitations is, is no longer material. On the other hand, if there had been a tolling in California, then we have to look to New York as well.

[46] The Court: "If," that is a big "if" in my mind as I view the matter from reading the papers that have been placed before me.

However, I am not going to preclude you from going ahead.

I will take this Exhibit 5.

Mr. Kostelanetz: Very good, thank you, your Honor.

(Documents received in evidence and marked as Exhibit 5, as of this date.)

The Court: Have I correctly stated your position in what I have just said?

Mr. Pride: Yes, your Honor, you do.

So that my whole position may be clear here in the development of the evidence, of course we will endeavor to show that National was doing business in both New York and California at the same time. In other words, if by any chance it could be held that the California stat-

ute was not applicable, the New York statute of six years would be applicable. In other words, they will have to show both that it was tolled in California and in New York.

Mr. Kostelanetz: Your Honor, I don't mean to divert, but Mr. Pride's statement as to what the plaintiff must show, I presume is with reference to his preliminary [47] showing: The burden of proof, as we understand it, is still on the defendant.

The Court: Oh, yes.

Mr. Kostelanetz: Yes, sir.

Now, if your Honor please, I respectfully offer certain papers as a proposed Exhibit 6, an action entitled B. Victor Sturdivant versus National Theatres Corporation, *et al.*, Superior Court, State of California, in and for the County of Los Angeles. This action was filed July 14, 1948.

Your Honor, the papers refer to a stipulation between attorneys for the parties on the issue of the right of the plaintiff to take a deposition. There is the memorandum ruling of the Honorable Clarence M. Hanson, the California Judge.

The Court: That is a State Court action?

Mr. Kostelanetz: Yes, your Honor.

Mr. Pride: And what is the date of that, Mr. Kostelanetz?

Mr. Kostelanetz: 1948, July 14, 1948.

Mr. Pride: July 14, 1948.

Now, with respect to this case, your Honor, as is apparent from Mr. Kostelanetz statement, no question of venue was involved in this matter in connection with [48] whether a particular individual could be examined as an officer of one company or another, and I submit it is irrelevant in this instance, and particularly the time element itself, 1948, would lead to the conclusion that it has no pertinence here.

Mr. Kostelanetz: May I answer that, your Honor?

The Court: Yes.

Mr. Kostelanetz: The defendant takes the position that it was in California from 1930 up to 1952, up to the time that it qualified to do business; yet, when they came to court in California, we say to your Honor, they tell the California courts as late as 1948 that they are not here, we are not here. The Court says they are not doing business here. It seems to me, if your Honor please, and I say this respectfully, not for any purpose of levity, actually you have a corporation that is going around at least in two states of the country as a, which Mr. Pride now would like to denominate, as some kind of corporate Baron Munchausen. It is for that reason, your Honor, that as late as here, as late as 1948, and later, even after the filing of the complaint here, they keep telling the world that they are not doing business in California, they are not conducting business in California.

[49] The Court: Well, I will accept it, or it may be admitted, and I will weigh it with all of the other evidence in the case.

Mr. Pride: If your Honor pleases, in view of your desire to push along here, I will forego the reply I obviously would desire to make to this observation of Mr. Kostelanetz.

However, in addition to the objections I have voiced, your Honor, I should point out that National Theatres Corporation in this particular case had never been served.

The Court: I cannot go into the merits of it just now.

(Document entitled "Stipulation for Issuance of Order to Show Cause, and Memorandum Opinion of Honorable Clarence M. Hanson, received in evidence as Plaintiffs' Exhibit 6, as of this date.)

Mr. Kostelanetz: If your Honor pleases, the opinion of the Court is as of August 2, 1948, and I quote:

"In the case before us the parent corporation"—

The Court: I don't think you need to take the time to do that.

Mr. Kostelanetz: All right, your Honor.

[50] Now, if your Honor please, I have in my hand proposed Plaintiffs' Exhibit 7. The case is entitled Ivan C. Hanson, *et al.*, against R K O Radio Pictures, Incorporated, *et al.*

The papers consist of a complaint and the answer of National Theatres, and amended and supplemental complaint and answer of National Theatres Corporation, and here, your Honor, the proffer deals with the denial of National Theatres in litigation in the District Court in California that "it is engaged in the business of operating motio picture theatres, directly or through subsidiary corporations and has principal offices in New York City, State of New York, and in the City of Los Angeles, State of California, within the Southern District of California."

As I say, that is denied, your Honor.

The Court: What is the date of that litigation?

Mr. Kostelanetz: This litigation was filed July 19, 1948, your Honor.

The Court: Is that a state court?

Mr. Kostelanetz: A state court, and the period—I am sorry, Federal Court, and the period covered by the complaint is from 1942 to July 19, 1948.

Mr. Pride: Your Honor, before you admit that, might [51] I just point out that what is being offered here is an answer filed by the attorneys for National Theatres in that case simply admitting certain of these formal allegations to which Mr. Kostelanetz has alluded, and then saying: "Except as hereinabove expressly admitted, deny each and every allegation contained in paragraph 6."

In other words, it is a pleading filed under the Federal Rules by attorneys for the company in California, and having in mind possible tax consequences which are quite

different from venue considerations. I submit, your Honor, that that as evidence is not an admission, it is not evidence of any circumstances that could be treated as a proof of the issue which is before you.

The Court: Well, I will have to read the papers; for the present, they are admitted.

Mr. Pride: Very well.

(Complaint, Answer of National Theatres Corporation, Amended and Supplemental Complaint and Answer thereto, received in evidence as Plaintiffs' Exhibit 7, as of this date.)

Mr. Kostelanetz: If your Honor please, the proposed Exhibit 8 is a similar situation, Markoy Corporation versus Twentieth Century Fox Film Corporation, *et al.*, filed March 8, 1949.

[52] This is an antitrust action where again National Theatres—this is in the Federal Court, of course, your Honor.

The Court: In California?

Mr. Kostelanetz: In California.

There again, National Theatres denies that it had a place of business in Los Angeles, or " • • • is engaged in the business of exhibiting motion pictures, either directly or through associated corporations in various parts of the United States, and more particularly in several of the western states, including California, and in the Cities of Los Angeles and Pasadena."

The period covered here appears to be November, 1947, to March 8, 1948.

Do you have the same objection?

Mr. Pride: Yes.

Your Honor, in order to get the complete picture before your Honor on these things, I am distressed that Mr. Kostelanetz tells the story up to this point and says the company put in an answer in the case which simply sets forth the formal statement as to jurisdiction, without

him saying that when the time for answer came around the company did at that time appear and of course waived any, by doing that, waived any possible [53] objections to venue. I would like that to go in somewhere.

Mr. Kostelanetz: Your Honor, my silence is not a concession as to Mr. Pride's statement.

The Court: The exhibit will be received.

Mr. Kostelanetz: Thank you.

(Complaint and Answer of National Theatres Corporation received in evidence as Plaintiffs' Exhibit 8, as of this date.)

Mr. Kostelanetz: Your Honor, Exhibit 9, or the proposed Exhibit 9 is almost identical with Exhibit 8, except that this case is known as Clare Allison, *et al.*, versus Twentieth Century Fox Film Corporation, *et al.*, a case in the District Court of California, filed October 6, 1949.

Again the allegations relate to National Theatres doing business and having offices in the Southern District of California, and again substantially you have the same kind of denial.

The Court: Well, does this cumulative proof add anything to what previously had been admitted?

Mr. Kostelanetz: Yes, yes, if your Honor pleases.

It seems to us, again as I indicated before, that for 22 years, as we see it, National Theatres has again, [54] again and again repeated this position.

The Court: All right, it will be received.

(Complaint in Clare Allison, *et al.*, against Twentieth Century Fox Film Corporation, with Answer of National Theatres Corporation, received in evidence as Plaintiffs' Exhibit 9, as of this date.)

Mr. Kostelanetz: The proposed Exhibit 10, your Honor, is slightly different. It is the case of Edward Levy versus Paramount Pictures, Incorporated, *et al.*, and this was

filed in the United States District Court for the Northern District of California on April 23, 1951.

The allegations, your Honor, cover a period from October 29, 1940, to April of 1951.

If your Honor please, the allegations of the answer of National Theatres is a little bit different, and I respectfully ask your Honor, because I do think this answer is important, if I may read it in full, that is, the relevant portions in full.

The Court: All right.

Mr. Kostelanetz: The answer of National Theatres says that:

"This court has no jurisdiction of defendant National. Defendant National at all times mentioned [55] in the complaint and herein was and is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Delaware and its principal office and principal place of conducting its business and affairs in the City of New York, State of New York. To and including the time of filing this answer said defendant has not had, and does not have, an office in the State of California nor has it engaged in or conducted, nor does it conduct or engage in, any business in the State of California, it has never qualified to do business in the State of California, and it has never consented to be sued in the State of California, or resided, or been found, or been present, or had any agent in the State of California."

Now, if your Honor pleases, that is the proposed Exhibit No. 10.

Mr. Pride: Judge Galston, to facilitate this, if the plaintiff proposes to offer any more of these formal pleadings—

The Court: That contains a great deal more, the Exhibit 10 is more than a formal offer: That goes right to

the heart of the matter. The affidavit recites that [56] during that period the defendant couldn't be found, and just that, of course, is the very kernel of the Eastman Kodak Company case, which is perhaps the grandfather of subsequent litigation along that line.

Mr. Pride: Your Honor, I respectfully have to differ with two of your remarks that I am sure were inadvertent.

There was no affidavit in this case, there was a formal pleading.

Your Honor, this is a case, sir, in which National Theatres was sued in California and appeared and answered, and thus waived any possible objection it could have to venue.

The Court: But does that permit them to say things that are not true?

Mr. Pride: It permits them, your Honor, in terms of the pleadings, and it is permitted under the Federal Rules of Civil Procedure, to plead these legal conclusions which are obviously related to tax considerations because the company did appear.

The Court: You will have to substantiate that contention in your briefs. That is going far afield in my judgment.

Mr. Pride: The second point, your Honor, is that [57] the period to which the answer expressly relates is all subsequent to 1940.

The Court: Is that said at any time?

Mr. Pride: It is mentioned in the complaint, the time is mentioned in the complaint.

The Court: Is it at any time mentioned in the complaint?

Mr. Pride: Oh, yes.

The Court: At any time?

Mr. Pride: Well, the answer is related to the allegations of the complaint, and that dates from 1940 to 1951.

Mr. Kostelanetz: Well, it speaks for itself, your Honor.

Mr. Pride: Very well.

The Court: I suggest you give that Exhibit 10 a good deal of attention in the final brief.

Mr. Pride: Very well.

The Court: It will be received.

(Complaint and Answer in the Matter of Edward Levy versus Paramount Pictures, Incorporated, received in evidence as Plaintiffs' Exhibit 10, as of this date.)

Mr. Kostelanetz: The proposed Exhibit 11, your Honor, are papers in the case of Allen Theatres Corporation versus Twentieth Century Fox Film Corporation, *et* [58] *al.*, filed May 18, 1950.

This was an antitrust action and covers the period April, 1940 to May, 1950.

This again charges the defendant National as follows:

"Defendant National Theatres Corporation, hereinafter referred to as 'National' is a corporation organized under the laws of the State of Delaware and is a wholly owned subsidiary of defendant Twentieth Century-Fox. It is engaged in the business of operating motion picture theatres, directly or through subsidiary corporation, in the Cities of Los Angeles, Huntington Park, and their environs, State of California, and elsewhere, and has principal offices in New York City, State of New York, and in the City of Los Angeles, State of California, within the Southern District of California."

Your Honor, the answer of National Theatres Corporation is as follows:

"Admit that defendant National Theatres Corporation is a corporation organized under the laws of the State of Delaware and is a wholly-owned subsidiary of defendant Twentieth Century-Fox Film [59] Corporation; deny that it is engaged in the business of operating motion

picture theatres and in that respect allege that said defendant owns, wholly or in part, the stock of corporations which operate motion picture theatres; admit that it has principal offices in the City of New York, but deny that it maintains any office or engages in any business in the City of Los Angeles within the Southern District of California."

Now, if your Honor pleases, it states by way of an eighth defense:

"That this court is without jurisdiction over defendant National Theatres Corporation. That said defendant is a corporation organized under the laws of the State of Delaware and has its principal office and place of business in the City of New York; said defendant maintains no office in nor does it engage in any business in the State of California and it neither resides, is found, or has any agent in the State of California."

Now, I have here the complaint, the answer, and the amended complaint and the amended answer, all having similar assertions.

Mr. Pride: Did you give the date of that action, [60] Mr. Kostelanetz?

Mr. Kostelanetz: Yes, it was May 18, 1950.

The Court: Yes, 1950.

Now, Mr. Kostelanetz, Mr. Pride takes the position that no weight is to be attached to allegations in a pleading because they are formal, and under the rules of practice permit the assertion of such allegations, but they are not to be deemed admissions of the facts.

Mr. Kostelanetz: If your Honor pleases, I know that there is an area where inconsistent defenses may be pleaded in an answer, but not, your Honor, false defenses, counterfeit defenses. National Theatres could not plead infancy, your Honor, if that were not true.

In other words, the defenses, even though inconsistent, must nevertheless be true.

I think that is the obligation, your Honor, of all lawyers; by our canons, we cannot put our name on anything unless we feel that we can warrant the position.

The Court: It is at least an interesting issue.

As I have suggested to Mr. Pride that he cover it in his brief, I will do the same to you.

Mr. Kostelanetz: Yes, your Honor.

Mr. Pride: May I make one observation, your Honor: I take the position I have particularly with respect to [61] a question of venue. In other words, amenability to suit where the company has itself said, "By appearing here we concede we are amenable to suit, we appear here in answer and we make these allegations."

The Court: I don't think that goes to the heart of it.

Mr. Pride: Well, of course, your Honor, having appeared and answered, whether it was doing business or not it completely waived.

The Court: They waived it when they set it forth in a serious pleading signed by someone connected with the defendant or by a reputable lawyer?

Mr. Pride: But it could have no significance, your Honor, as to their amenability to suit: They were there, they appeared.

The Court: If they say otherwise, it certainly is an inconsistent position so far as the present attitude is concerned.

Mr. Pride: Even if the issue had ever been tried and determined against them, National still was subject to jurisdiction in California, having appeared and answered: So these had nothing to do with venue considerations.

The Court: Well, I am not sure about that.

[62] Mr. Kostelanetz: If your Honor pleases, the proposed Exhibit 12 is a complaint and answer in a case entitled: "Parkton Theatres, Incorporated, versus Fox West

Coast Theatres Corporation, *et al.*," filed September 7, 1950.

This was an antitrust action containing substantially the same allegations as alleged in the prior case, and covering a period, your Honor, of 1930 to September 7, 1950.

Here the defendant National Theatres says that:

"Admit that the defendant National Theatres Corporation is a corporation organized under the laws of the State of Delaware and is a wholly-owned subsidiary of defendant Twentieth Century-Fox Film Corporation; deny that it is engaged in the business of operating motion picture theatres and in that respect allege that said defendant owns, wholly or in part, the stock of corporations which operate motion picture theatres; admit that it has a principal office in the City of New York, but deny that it maintains any office or engages in any business in the City of Los Angeles within the Southern District of California."

Then, further, your Honor, it affirmatively says [63] in the sixth defense:

"That this court is without jurisdiction of defendant National Theatres Corporation. That said defendant is a corporation organized under the laws of the State of Delaware and has its principal office and place of business in the City of New York; said defendant maintains no office in nor does it engage in any business in the State of California and it neither resides, is found or has any agent in the State of California." That is the proposed Exhibit 12.

The Court: It will be received.

(Complaint and Answer in the matter of Parkton Theatres, Inc., v. Fox West Coast Theatres Corporation,

t al., received in evidence as Plaintiffs' Exhibit No. 12 s of this date.)

64] Mr. Pride: I think you said, your Honor, when the irst one of these came up with respect to periods beyond he date 1938, that you were going to admit them for the ourposes of the record, but I would like to have my ob- ection to each of them noted for that same purpose.

The Court: Yes.

Mr. Kostelanetz: May I offer as Exhibit 13, consisting of a complaint and answer, in a case entitled South Side Theatres, Inc., against Loews, Inc., District Court of California, filed October 5, 1950, an anti-trust action. And the complaint in this case is very much like the complaint which I had referred to in the prior exhibit, but the period covered here, according to the complaint, says from at least 1935 to October 5, 1950.

The Court: Is the present defendant a party?

Mr. Kostelanetz: Oh, yes, your Honor. And the answer of National Theatres in its ninth defense again says that this Court is without jurisdiction; that the defendant is a Delaware corporation, doing business in New York; that it maintains no office; engages in no business; neither resides; is found, or has any agent in the State of California. That is 13.

[65] (Complaint and answer in South Side Theatres, Inc., against Loews, Inc., District Court of California, filed October 5, 1950, received in evidence as Plaintiffs' Exhibit No. 13.)

Mr. Kostelanetz: Proposed Exhibit 14, your Honor, is a complaint and answer in the case entitled Alex Mounce against Twentieth Century National Theatres, and Paragraph Sixth has a similar allegation to that which I set out with regard to Exhibit 13.

The Court: What is the period?

Mr. Kostelanetz: According to the allegation, the complaint says: Many years prior to November, 1939, to October 3, 1950.

The answer and the affirmative defense is practically the same which I just stated for the prior one. No office; no residence; not found; no agent in the State of California.

(Complaint and answer in case entitled Alex Mounce against Twentieth Century National Theatres, received as Plaintiffs' Exhibit 14 in evidence.)

Mr. Kostelanetz: Proposed Plaintiffs' Exhibit 15, your Honor, is in a great many respects the same as the prior one. It is the complaint and answer in a case known as Skyline Drive-In Theatre Corporation against [66] Paramount Pictures, Southern District of California, filed July 26, 1951.

Now, the complaint says substantially what was said previously except it fixed the place of business at 1609 West Washington Boulevard, Los Angeles, California.

And the answer denies that it is doing business; that it maintains any office, agent found, or any of the other things to which we have previously referred.

(Complaint and answer in case known as Skyline Drive-In Theatre Corporation against Paramount Pictures, Southern District of California, filed July 26, 1951, received in evidence as Plaintiffs' Exhibit No. 15.)

Mr. Kostelanetz: Plaintiffs' Exhibit 16, your Honor—

The Court: Proposed 16.

Mr. Kostelanetz: Proposed 16. I am sorry I misspoke, sir.

It is the case of James against Twentieth Century Fox Film Corporation filed March 28, 1951. It is an anti-trust action in the Federal Court in California and has similar allegations, except in addition to Los Angeles it names certain counties in California as the place where it did business—allegedly did business—and National Theatres denies Paragraph Fifth that it [67] maintains

any office, or engages in any business in the State of California. And in its seventh affirmative defense says that the Court is without jurisdiction over National; that it has its principal office in New York; maintains no office; engages in no business—does not engage in any business—and it neither resides; is found; or has any agent in the State of California.

That is Plaintiffs' Exhibit 16.

(James vs. Twentieth Century Fox Film Corporation, filed March 28, 1951, Federal Court, California, received in evidence as Plaintiffs' Exhibit No. 16.)

Mr. Kostelanetz: Proposed Plaintiffs' Exhibit 17, your Honor, refers to an antitrust action. And there is the complaint and amended supplemental complaint and answer of the defendant National in the case entitled Pouros against National Theatres filed in California December, 1949.

It has substantially the same allegation as the one made in the prior complaint. The period covered is many years prior to 1936 to December 31, 1949.

The answer is a little bit different, your Honor. It is a short paragraph and I will read it quickly.

Admits that National Theatres Corporation is a corporation organized under the laws of the State of [68] Delaware and is a wholly-owned subsidiary of defendant Twentieth Century Fox Film Corporation.

Alleges that National Theatres Corporation owns all of the stock of Fox West Coast Theatres Corporation.

And that National Theatres Corporation has principal offices in the State of Delaware.

Alleges that National Theatres Corporation does not now nor has it at any time done business in the State of California except as expressly admitted.

Denies the balance of the allegations contained in Paragraph Sixth, Paragraph Sixth being the charging paragraph concerning jurisdiction in this case.

(Complaint, amended supplemental complaint and answer of defendant National in Pouros against National Theatre, filed in California December, 1949, received in evidence as Plaintiffs' Exhibit No. 17.)

Mr. Kostelanetz: Your Honor, with regard to this last exhibit, this proposed exhibit, it is an action called Credito Cinematografico Mexicano, *et al.*, versus Twentieth Century Fox Film, *et al.*, including National Theatres, and this was a Federal Court action filed January 20, 1949.

The Court: Where?

Mr. Kostelanetz: In the brief which we submitted to you we did not include it in the sheet summarizing [69] the action—

The Court: No. I mean the Federal Court where?

Mr. Kostelanetz: The Federal Court, Southern District of California.

If your Honor will permit me to just lay one of these aside for the Court—I have given the other side a copy—this, your Honor, is an action for rescission and damages —not an antitrust action.

It alleges, your Honor, that National Theatres was a corporation organized under the laws of the State of Delaware doing business in the State of California, and it alleges particularly that National Amusement, an allegedly wholly-owned subsidiary of National was used as a convenience or instrumentality for National.

The answer of National Theatres Corporation, your Honor, denies that National was doing business in California. The period covered by the complaint was prior to March, 1947, and the answer states particularly that National Theatre Amusement Co., Inc., is a completely separate entity, operated as a separate entity, and none of the corporations is an instrumentality for any other corporation, and no corporation engages in the business of any other corporation.

Now, that is proposed Exhibit 18.

[70] (Credito Cinematografico Mexicano, *et al.*, versus Twentieth Century Fox Film, *et al.*, including National Theatres, was received in evidence as Plaintiffs' Exhibit No. 18.)

Mr. Kostelanetz: Will your Honor just bear with me a moment.

If your Honor please, I think we have made our showing. I think at this point, if your Honor please, it is up to the defendant to put in his case.

The Court: Well, you rest?

Mr. Kostelanetz: Well, if your Honor please, I rest as to a showing, if your Honor please.

The Court: Well, there is one issue here.

Mr. Kostelanetz: Yes.

The Court: You put in what you need to sustain your position, and you rest. That does not mean that you have not the right of rebuttal.

Mr. Kostelanetz: Very well, your Honor.

[71] Mr. Pride: I respectfully move to dismiss the complaint upon the showing thus far made, your Honor, and specifically for this reason, sir, as to the law of New York, in the memorandum which I handed up to your Honor, where it appears on the face of the complaint that the actions are barred, the burden of proof of establishing that for some reason or other the statutes have been tolled, rests with the plaintiff.

I respectfully refer your Honor to cases cited, for example, in which the Appellate Division so indicates, and to sum it up the burden rests upon the plaintiffs to prove the facts needed to generate the bar, if any, to the deadly effect of the statute.

In other words, we are here. It appears the statute has run. The burden then rests upon the plaintiff. In that respect, I do at the expense of a few minutes here, call your Honor's attention to the fact that the only proof

submitted or which is contained in the extracts are from various unrelated court proceedings.

Now, let us look at those with respect to the significant periods of time here involved—

The Court: No. I won't ask you to give me the benefit of detailed argument now. I will reserve decision on your motion.

[72] Mr. Pride: Very well, your Honor.

Without regard to this motion—could I except to your Honor's ruling in that regard?

The Court: It is your privilege.

Mr. Pride: You will forgive me for that inept use of language. What I meant, your Honor, was I was not trying to argue the matter further in this connection.

I did want to point out that as far as New York is concerned, the showing required that the tolling of the statute is first that the defendant not be present within the state, or if a corporation, that it have no officer within the state upon whom service could be made.

I respecfully submit in these papers that have been handed up to you no reference is made to that second point in any respect.

I take it your Honor is reserving on that and I shall go forward with testimony.

The Court: Yes.

Mr. Pride: Thank you.

I call Mr. Edmondson.

Defendant's Witness, John P. Edmondson, Direct

[73] JOHN P. EDMONDSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Pride:

Q. Mr. Edmondson,will you state your residence, please? A. 3 Cahawney Road, Scarsdale, New York.

Q. What is your present occupation, Mr. Edmondson? A. I am a book publisher, sir.

Q. With what concern are you connected? A. E. P. Dutton & Company, 300 Fourth Avenue.

Q. How long have you been with that company? A. Since January 1, 1946.

Q. Do you presently have any association with the defendant in this case, National Theatres Corporation? A. No, sir.

Q. Now, Mr. Edmondson, I would like to direct your attention to the year 1932.

In that year did you become an officer of the defendant National Theatres Corporation? A. Yes, sir.

Q. It was then known as WESCO Corporation? Is that correct? A. Yes, sir.

Q. In my questioning I will refer to the company throughout as National, since I believe the name simply [74] represented a change of name from WESCO to National, and there was no change in the corporate structure. Is that correct? A. That is correct, sir.

Q. Do you recall, Mr. Edmondson, to what office you were elected in the defendant corporation in 1932? A. The office of Assistant Secretary.

Q. Do you recall about when in that year you were elected to that office? A. I believe it was either in January or February.

Q. 1932? A. Yes.

Q. Now, how long did you serve in that office, Mr. Edmondson? A. Well, I don't recall the exact time, but

possibly a year or so later, I was made secretary of the same company.

Q. That would be in 1933? A. Yes, about that.

Q. And how long did you serve in that office? A. My recollection is it was around a year and a half, in November of 1934, as I recall it, and I was replaced by Mr. William T. Gossett.

Q. In November of 1934. Is that correct? A. Yes.

Q. Then were you re-elected secretary at a later period? A. Yes. I believe it was about a year later, I believe in November of 1935.

[75] Q. You were again elected secretary of the defendant at that time? A. Yes.

Q. How long did you serve in that office, Mr. Edmondson? A. My recollection is I served in that office until around July of 1945 when I went in the army—July of 1942, it was.

Q. Until you entered the Armed Services in July, 1942, is that correct? A. Yes.

Q. So that except for this period from November, 1934, until November, 1935, you were either the secretary or assistant secretary of the defendant from February, 1932, to June of 1942. Is that correct? A. That is correct.

Q. Now, Mr. Edmondson, while serving in those capacities, did you have charge of and keep the corporate records of the defendant National Theatres Corporation? A. Yes, sir.

Q. And did you attend board meetings of the company? A. Yes, sir.

Q. And did you yourself prepare certain minutes of the meetings of the board of directors of the company? A. Yes, sir.

Q. Mr. Edmondson, would you look at this book which I have just handed to you, and I ask you if you can identify that as the official minute book of National Theatres [76] Corporation, on the label on the front of

which is the name WESCO Corporation? Can you so identify it, sir? A. Yes, sir.

Mr. Pride: Your Honor, I have several of these minute books which cover the period during which Mr. Edmondson was either assistant secretary or secretary, and just from a mechanical standpoint I would ask him to come here and look at all of them, or have each of them handed up to him.

The Court: Let us assume that he says they are the official records of the defendant company during the time that he was either assistant secretary or secretary, and during the recess, if he finds that that is not so, why, it may be corrected.

Mr. Pride: Very well, your Honor.

On that assumption I offer the books in evidence, and ask to have them marked as Defendant's Exhibits A to H.

The Court: Well, I don't suppose that you actually want them as an exhibit, that is, the entire minute book or books, do you? You want just certain pages, don't you?

Mr. Pride: Well, your Honor, that presents a rather serious mechanical problem. We will produce [77] and offer a witness who will be qualified to do so the significant portions of these minutes, which we believe bear upon this case, but I first wish to have these official records marked as exhibits in the case. I know of no other way to have Mr. Edmondson, who of course has not been active in this capacity for ten or twelve years—

The Court: All right, the eight volumes will be known as Defendant's Exhibit A, but subject to testimony with respect to certain relevant pages from each of the volumes.

Mr. Kostelanetz: May I respectfully suggest that possibly the exhibit can be marked as an exhibit for identification, your Honor, to the extent it has been identified by the witness. I am sure your Honor does not, nor neither does Mr. Pride, nor do we want to have the burden of reading all this, and perhaps at the time when it is necessary the particularly relevant pages may be marked in evidence.

The Court: I will accept the offer of the exhibit, but subject to the condition that only relevant pages of each of the volumes will actually be regarded as the exhibits in the case.

Mr. Kostelanetz: Then as I understand it, your [78] Hor r, you have held up your ruling on relevancy until the time the particular pages are offered.

The Court: Well, of course that must be done, but they are now received as the official records and not beyond it. They are received as the official records. I do not pass on the matter of relevancy or materiality. Of competency, yes, but not the other grounds.

Mr. Kostelanetz: And that neither side may refer to the records without first offering them to your Honor.

The Court: That is right.

Mr. Pride: Perhaps I don't quite understand Mr. Kostelanetz' last statement.

The Court: Well, you can't, for instance, read from page 211 of the minutes of 1943 without showing it bears on the issues here.

Mr. Pride: I want to be in the position of reading from that page as a matter of competency. You say they are admitted as the official records of the company.

Mr. Kostelanetz: So long as we understand each other. I do think this is rather important, we do not want any part of these minutes submitted in any brief to your Honor, or read into the record, without your [79] Honor first passing on it, otherwise it is obviously unfair.

The Court: Why do I have to repeat my ruling?

Mr. Kostelanetz: I am sorry, your Honor.

(Minute books referred to, being eight in number, were received and marked Defendant's Exhibit A in evidence.)

By Mr. Pride:

Q. Mr. Edmondson, during the entire period that you were assistant secretary or secretary of National Theatres Corporation, where did you reside?

Mr. Kostelanetz: Objected to as immaterial, your Honor.

The Court: Overruled.

A. In New York City, sir.

Q. Now, where was your office during that entire period?

Mr. Kostelanetz: Objected to as immaterial, and in addition calling for a conclusion, which under these circumstances, is very relevant, your Honor.

The Court: Overruled.

A. It was at 444 West 56th Street, with one exception; I believe that there was a period of about a year where I had a part-time address in Jersey City. I would stay [80] there maybe a day or two of the week, sometimes a half day. I also maintained an office up at 444.

Mr. Kostelanetz: I respectfully move to strike out the answer.

The Court: Now, Mr. Kostelanetz, what is the purpose of that? I have been very liberal in ad-

mitting your exhibits, and I am going to be very liberal in admitting the testimony of the witness. There is no jury to be influenced. I want to get the entire picture. I will repeat that I am very sorry that this issue has to be tried independently of the main case.

Mr. Kostelanetz: May I state one further ground of my objection then, your Honor, and then I will sit down, but this entire line of testimony as I now see it—the objection, if your Honor please, to this evidence is that the defendant in this case has been precluded from taking an inconsistent position by the representations which the defendant has made to the courts over a period of twenty-two years, and this is, we believe, a public policy situation which arises, as we have read it, out of preserving the dignity of the courts and the dignity of the oath, and it is on the basis of that upon which we respectfully—

The Court: I overrule the objection.

* * * * * * *

[81] *Direct Examination by Mr. Pride (continued):*

Q. Mr. Edmondson, before luncheon you testified that you became an officer of the defendant here in January or February of 1932? A. Yes.

Q. Now, at that time, Mr. Edmondson, what was the nature of the business of the defendant company?

Mr. Kostelanetz: I object to that, your Honor. There are papers here, charters, which identify it.

The Court: I will overrule the objection.

Mr. Kostelanetz: It calls for a conclusion.

A. At that time my best recollection is that it was a holding company.

Defendant's Witness, John P. Edmondson, Direct

Q. Yes. A. The name then was Wesco, later changed to National. It simply held stocks in other companies. It was more or less a shell of a company. Those stocks that it held were principally Fox West Coast Theatres, Fox Rocky Mountain, Fox Midwest, and perhaps one or two others that I don't recall. And those companies in turn owned stocks in operating companies. And those operating companies were engaged in the operation of theatres, of which I believe there were some 500 or 600 or thereabouts in various parts of [82] the United States.

So the function of the company was merely to hold the stocks, to collect dividends when declared by the various subsidiaries, and then it paid out if such action was deemed necessary by the Board.

Q. By whom was this stock of the company owned at that time, Mr. Edmondson, the defendant, I am talking about? A. In 1932, it was owned entirely by Fox Film Corporation.

Q. And as I understand your testimony, the defendant in turn owned the stocks of various subsidiary companies, which subsidiaries in turn owned the stocks of others, is that correct? A. That is correct.

Q. You have testified that some of these theatres which were operated through the subsidiary companies were in California. Do you know how many, approximately, were there, Mr. Edmondson?

Mr. Kostelanetz: Objected to as immaterial, your Honor.

The Court: Overruled.

Mr. Edmondson: I couldn't say exactly how many, but I should say the vast majority—certainly fifty per cent of them were there, maybe more.

Defendant's Witness, John P. Edmondson, Direct

Q. In other words, fifty per cent of the 500 or 600 theatres that you have referred to were in California?

[83] A. Yes, sir. That is my recollection.

Q. And as to these theatres, were they operated through companies which were wholly owned, directly or indirectly by the defendant? A. Yes, sir.

Q. Now, Mr. Edmondson, when you became an officer of the defendant, were you familiar with the other officers of the company? A. Yes, sir.

Q. And beginning in the early part of 1932, when you were elected an officer, do you recall who the other officers of the company were at that time?

* * * * * * *

[84] A. Mr. S. P. Skouras was president.

Mr. Charles E. Richardson, vice-president.

And I believe a Mr. Fahlbusch was secretary.

And I am not sure, but I think Mr. Michel was vice-president and treasurer, W. C. Michel. There may be others, but that is to the best of my recollection.

Q. Now, Mr. Edmondson, did you know or do you know where these other officers then resided?

Mr. Kostelanetz: If your Honor please, now I object to that as immaterial.

The Court: Overruled.

A. I believe that Mr. Skouras lived in Mamaroneck, New York, and commuted in each day.

I think Mr. Richardson lived in an apartment here in town, in Manhattan.

Mr. Michel lived on Staten Island and commuted over.

Mr. Fahlbusch, I have no recollection as to where he lived, but that is roughly my best recollection.

Q. Yes. Well now, taking these officers which you have mentioned, where did Mr. Richardson, whom you said was vice-president, I believe, have his office?

Defendant's Witness, John P. Edmondson, Direct

Mr. Kostelanetz: Objected to, if your Honor please.

[85] The Court: Overruled.

A. 444 West 56th Street.

Q. And did the other officers that you have named have their offices at this same address? A. Yes, sir.

Mr. Kostelanetz: Objected to as calling for a conclusion.

The Court: You will have to change the form of the question.

Mr. Pride: I was just trying to short-cut it.

The Court: I thought so.

Q. Do you know where Mr. Michel, whom you have testified was a vice-president of the company, had his office?

Mr. Kostelanetz: I object to the question. May I be heard, your Honor?

The Court: Oh, no, I am not going to ask for argument on elementary canons of evidence.

Overruled.

Mr. Pride: You may answer.

A. 444 West 56th Street.

Q. Do you know where Mr. Fahlbusch had his office? A. At the same address.

Q. Where did Mr. Skouras, whom you said was the president of the company, have his address?

Mr. Kostelanetz: Same objection.

[86] The Court: Overruled.

A. At the same address.

Q. 444 West 56th Street, New York City? A. That is correct.

Defendant's Witness, John P. Edmondson, Direct

Q. Now, Mr. Edmondson, how long did Mr. Skouras continue to hold the office of president of the defendant? A. He continued as president, I believe it was, until 1934, at which time he was supplanted by Mr. S. R. Kent, and Mr. Skouras in turn became executive vice-president, as I recall.

Q. Now, Mr. Edmondson, let me ask you, do you recall what time of the year 1934 Mr. Skouras became executive vice-president instead of president? A. I think it was in November.

Q. Between February, 1932 and November of 1934, where did Mr. Skouras, president of the defendant, have his office?

Mr. Kostelanetz: Again, if your Honor pleases, that is objected to.

The Court: Overruled.

A. 444 West 56th Street, New York City.

Q. And in that period of time did he have an office anywhere else? A. Not to my knowledge.

Q. Now, Mr. Edmondson, do you know the nature of the services performed by Mr. Skouras in this period of time?

[87] The Court: Which period?

Mr. Pride: The period of 1932 to 1934, when he was president of the company.

Thank you, your Honor.

Mr. Kostelanetz: If your Honor please, I object to that. If we are talking about minutes, the minutes are here.

The Court: Overruled.

A. Mr. Skouras and his brother Charles Skouras had been engaged, as I recall it, under a contract to operate this vast theatre chain.

Defendant's Witness, John P. Edmondson, Direct

As between the two brothers, Mr. S. P. Skouras was the head. He as president of National, of course, which was the over-all holding company, acted in one capacity, but his duties at the office there were varied. They embraced the operation, the vast operation of the theatres, and the multifarious problems that go into it.

Mr. Kostelanetz: I espectfully move to strike out the answer, if your Honor pleases.

The Court: Motion denied.

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[88] Q. Do you know where the services performed by Mr. Spyros Skouras, as president of the company, were performed?

Mr. Kostelanetz: Objected to, if your Honor please, again.

The Court: Well, suppose you take an objection to everything that is asked this witness and I will overrule it.

Mr. Kostelanetz: I am sorry, your Honor, but as your Honor knows, I am not captious in my objections.

The Court: I can't understand your objections.
[89] This is preliminary to something. Overruled. There is a statute of limitations involved, and it is important to know whether the defendant was operating or could be found in California and/or in New York. Now, that is all.

Mr. Kostelanetz: If your Honor please—

The Court: I don't want to hear any more. If you had not been allowed great freedom, many of your exhibits would not have been admitted.

Mr. Kostelanetz: If your Honor please, would your Honor permit me to address the Court for exactly one minute as to what it is that is bothering me with regard to these questions?

Mr. Skouras or the Skouras brothers were head of 50 to 100 corporations. They were wearing 50 to 100 hats during this operation. And the questions as addressed by Mr. Pride go along the line of what the president of National Theatres, and where did he have his office. The office he is referring to is not necessarily the office of National Theatres.

The Court: You have not been foreclosed from cross examination, have you?

Mr. Kostelanetz: Thank you.

Mr. Pride: Would you read the question, please.

[90] (The question was thereupon read by the Reporter as follows):

"Q. Do you know where the services by Mr. Spyros Skouras as president of the company were performed?"

Mr. Pride: Do you recall the last question or shall I have it read to you again?

The Witness: I heard it.

A. I would say that these services as respecting the National Theatres Corporation were performed for the most part in New York City.

Q. From your knowledge, do you know whether or not Mr. Spyros Skouras performed any services for the company, that is, National Theatres Corporation, in California?

Mr. Kostelanetz: If your Honor please, may I have a standing objection? I think that is what your Honor directed, but I am not sure.

The Court: What do you want to do?

Mr. Kostelanetz: May I have a standing objection to questions put to this witness with regard to services performed?

The Court: Yes.

Mr. Kostelanetz: I do not want to rise, and that, as I understand it, is your Honor's direction.

The Court: All right.

[91] A. I would say that he performed services for National in other states, because operating decisions that were made for theatres in other states had an effect on the investment of National. Whether or not he was acting in one capacity, or some other capacity, I wouldn't know, but I should say that he was looking after the interests of National no matter where they were.

Q. And that would include California? A. Yes, sir.

Q. Now, Mr. Edmondson, you have testified that a brother of Mr. Spyros Skouras, president of the company, namely, Mr. Charles Skouras, was also employed at this time to act as a general manager of the company's business, is ~~that correct?~~ A. Yes, sir.

Q. And did you know Mr. Charles Skouras? A. Yes, sir.

Q. Now, from 1932 until 1942, the time that you left, you have said your association, or resigned your association with the defendant, do you know where Mr. Charles Skouras resided? A. Los Angeles, California.

Q. And where was his office during that period? A. On West Washington Street, Los Angeles, California.

Q. That is throughout the period? A. Yes.

Q. Now, you have testified that Mr. Spyros Skouras [92] became executive vice-president of National Theatres in November of 1934.

From that date until 1942, do you know whether Mr. Spyros Skouras continued to hold the office of executive vice-president of the company? A. To my best recollection he did continue to hold that office.

Q. November, 1934 to 1942? Right? A. Yes.

Q. Now, in that period of time where did Mr. Skouras have his office? A. 444 West 56th Street, New York City.

Q. Did he have that office there continuously through those years? A. Yes.

Q. Who succeeded Mr. Spyros Skouras as president?

The Court: I think the witness testified as to that this morning.

Mr. Pride: Yes, he did.

Q. I believe you have testified that Mr. Sidney Kent became president of the company, that is, of the defendant here in 1934, is that correct? A. Yes, sir.

Q. Where did Mr. Kent reside? A. In New York City.

Q. Where did Mr. Kent have his office? A. At 444 West 56th Street, New York City.

[93] Q. Did he have that office there continuously throughout that period of time? A. Yes, sir, to his death.

Q. And that occurred when? A. In March, 1942.

Q. During this same period Mr. Kent was also the president of Twentieth Century-Fox Film Corporation, was he not? A. Yes, sir.

Q. Mr. Edmondson, do you know whether or not National Theatres opened an office in Jersey City, New Jersey? A. Yes, sir, it did.

Q. When was that office opened? A. I believe it was in 1936. I may be wrong on that. That is my best recollection. And it continued for a little over a period of a year, around a year and a half from the date it was opened.

Q. With respect to the date which you have fixed for us from your recollection, Mr. Edmondson, would the minute books of the company fix the exact date for that, do you know? A. I don't know whether it would fix the exact date, but it would certainly show the first meeting which was held over there, which would be pretty close to it.

Mr. Pride: Well, I will come back to that date, your Honor.

Defendant's Witness, John P. Edmondson, Direct

Q. When this office was opened in Jersey City, do you know what personnel of the company worked in that office?

[94] A. Yes, sir.

Q. Would you give us that information? A. It is my understanding that the tax counsel for the corporation felt that there was some question as to whether or not the company would be liable for certain local state taxes here, so they decided to open this office in Jersey City.

At that time they took with them Mr. A. S. Gambee, who was the vice-president, and Mr. H. C. Cox, who was the vice-president and treasurer, and I should say about seven or eight other employees that had to do with the bookkeeping and financial side of the corporation. And they opened this office in Jersey City. And it remained open for about a year and a half, and it started to become impractical, and they brought the administrative side back to New York City because the executives, who were running it, wanted it close by, so they could have the information more readily available.

Mr. Kostelanetz: May I move to strike out the first part of the answer up to the point where they brought Mr. Gambee to Jersey City.

The Court: Do you mean the reasons for moving as given by the lawyers?

Mr. Kostelanetz: Yes, your Honor.

[95] The Court: Yes, that may be stricken.

Mr. Pride: I don't know whether you are striking it because it was not responsive, so I will now ask my next question.

Q. Do you know the purpose of the opening of these offices in Jersey City with Mr. Gambee?

Mr. Kostelanetz: If your Honor please, I respectfully object. If he would give the conversations and who was present—

The Court: I will overrule the objection.

A. It is my understanding that it was a tax matter which involved the question of whether or not that company would be strictly a holding company and would be liable for certain taxes here in the State of New York, and that the tax lawyers thought—

The Court: Don't tell us what they thought.

Q. Did Mr. Kent, president of the company, ever have an office in these offices in Jersey City? A. No, sir.

Q. Did Mr. Spyros Skouras, the executive vice president of the company ever have an office there? A. No, sir.

Q. Mr. Edmondson, you testified, I believe, that you attended meetings of the Board of Directors of National [96] Theatres Corporation, is that correct? A. Yes, sir.

Q. Now, with respect to the period from 1932 to 1936, do you know where the meetings of the Board of Directors of the corporation were held? A. Yes, sir.

Q. Where? A. In New York City.

Q. Does that apply to all of the meetings held during that time? A. All that I had anything to do with.

Q. As far as you know, it was all of them? A. Yes.

Q. Let me ask you, were the meetings of the Board of Directors of the company frequent, or infrequent, during that period of time? A. I would say infrequent.

Q. Do you have any recollection as to the number of such meetings held each year? A. No, sir. I don't. But my impression is, or to the best of my recollection it is that we only held them when as and if we had to. It was as infrequently as possible. I had to draw the minutes and I tried to make them as infrequently as possible.

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[97] Q. Mr. Edmondson, I show you what purports to be the minutes of a special meeting of the Board of Directors of WESCO Corporation, held at 444 West 56th Street, on January 23, 1933, being contained in one of the books which comprises this exhibit, Defendant's Exhibit A—

The Court: What is the question?

Mr. Pride: I am going to ask the witness.

Q. (Continuing) —does that book which you have contain minutes of other meetings of the Board subsequent to that date in 1933? A. Yes, sir.

Q. How many meetings, Mr. Edmondson? A. In this book there was one held on the date you mentioned, namely, January 23, 1933.

The next one was held on the 6th day of February, 1933.

There were numerous adjournments where no business was transacted.

[98] And the next meeting where business was transacted was held on February 24, 1933.

All of those were held at 444 West 56th Street, New York City.

That concludes the ones that are in this book.

Q. Now, I show you a second book, which is part of Defendant's Exhibit A, directing your attention to what purports to be the minutes of a meeting of the Board of Directors held at the office of the corporation at 444 West 56th Street on March 6, 1933, and I ask you if you can tell us from the book which you have in your hand how many additional meetings were held in the year 1933?

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[99] Q. Well, let me ask you, on the basis of the examination you have made of this book which is part of Defendant's Exhibit A, where were the remainder of the meetings which were held in 1933 so held? A. At 444 West 56th Street.

Q. Mr. Edmondson, are you familiar with the organization of a company known as the National Agency Corporation? A. Yes, sir.

Mr. Kostelanetz: I do not know if I am prohibited from objecting. Do I have a continuous objection on this, your Honor?

The Court: Do you mean it is an objection that is almost underlined?

Mr. Kostelanetz: If I have a continuous objection [100] on the relevancy of National Amusement.

The Court: Well, to the line of questions, if the subject is changed.

Mr. Kostelanetz: I respectfully object on the ground of materiality as to anything done by National Amusement.

The Court: Well, I can't agree with your point on that. I also might say I anticipate that the National Agency Corporation is going to be used as evidence of the location in California and subject there to process, is that correct?

Mr Pride: Also New York.

The Court: And New York. I overrule the objection.

Q. When was that organized, Mr. Edmondson? A. I believe it was in 1935.

Q. Do you know whether it was qualified to do business in New York? A. Yes, sir, it was a Delaware corporation and qualified to do business in New York.

Mr. Kostelanetz: Would you fix a date?

Mr. Pride: Yes. I was going to get to that.

Mr. Kostelanetz: I am sorry.

Q. Do you know the date upon which it was qualified to do business in New York, Mr. Edmondson? A. I would say it was either the latter part of 1935 or [101] early part of 1936.

Q. Now, did you become an officer of that corporation? A. Yes, sir. I was secretary.

Q. Secretary, did you say? A. Yes, sir.

Q. How long did you continue in that office, Mr. Edmondson? A. Until I left the employ of the company in July of 1942.

Q. What was the nature of the business of this National Agency Corporation? A. National Agency was a company that was organized for the purpose of furnishing advisory and supervisory service or services to this vast chain of theatres.

It also would recommend financial policies to them. [102] We in the Agency Company, whose name was later changed to National Theatres Amusement—it had a contract with National Theatres Corporation, and under that contract I think it paid them something like $3,000 a week for these services—

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Q. I ask you quite apart from any contract, so the record may be clarified here, is it your testimony that National Theatres, the defendant, paid this National Agency Corporation $3,000 per week? A. Yes, sir.

Q. For services which it rendered to National Theatres, is that correct? A. Yes, sir.

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[103] Q. Now, I believe you testified, Mr. Edmondson, as to some of the things which the National Agency Corporation did for National Theatres Corporation? A. Well, they were more than that, as I testified.

Q. Well, do you recall any other such services? A. Yes. We would at the board meetings of National Agency consider any acquisition, repairs, improvements to various theatres throughout the chain, and then this Board would recommend, through its intervening line of subsidiaries, that the operating company expend the money and take the action, but it was entirely advisory and supervisory throughout.

In addition to that, this Agency Company bought all of the motion pictures that were exhibited in these theatres, which was a vast and unique operation, and that type of thing was from time to time considered by the Board, but nevertheless it was in the hands of the experts who were located there at 444 West 56th Street.

Q. Now, specifically do you recall whether the National Agency Corporation performed bookkeeping and accounting services for National Theatres Corporation? [104] A. Yes, sir, it did.

Q. Where were those services performed? A. But for the period of a year and a half that they were in Jersey City, they were all performed in New York City at 444 West 56th Street.

Q. Now, who were the other officers of this Agency Corporation, Mr. Edmondson? A. My recollection is that Mr. S. R. Kent was the Chairman of the Board; Mr. S. P. Skouras was the president; Mr. A. S. Gambee, vice-president; H. C. Cox was vice-president and treasurer; and I was the secretary. And there may be other officers, but they were all that I recall.

Q. And from the time that this National Agency Corporation commenced operations, up to the time when you resigned, where did it maintain its offices? A. 444 West 56th Street.

Q. And where in that period of time did these other officers of the company have their offices?

Mr. Kostelanetz: Which company?

Mr. Pride: National Agency Corporation.

A. At the same address.

Q. That is all of them? A. All of them.

Q. Now, during this period from about the beginning of 1936 to 1942, when you left the employ of the company, were [105] there any meetings of the Board of Directors of this Agency Corporation? A. Yes, sir.

Q. Where were they held? A. At 444 West 56th Street, New York City.

Q. Do you have a recollection as to whether they were frequent or infrequent? A. Those meetings were frequent. We held those at regularly stated times, I believe once a week, and we held them religiously because they embraced a vast variety of things and services that we had performed.

* * * * * * *

Q. You have told us, Mr. Edmondson, certain general types of matters which were considered and passed upon by this Board of the Agency Corporation. Now, specifically can you describe or tell us whether or not there was any policy as to what matters would be considered by this Agency Board? [106] A. Yes, sir.

Mr. Kostelanetz: Will counsel fix the time?

The Court: Well, at the beginning of the incorporation up to the time that you left.

Mr. Pride: 1942.

The Witness: That is right, your Honor.

Generally on all matters that affected the financial structure where a commitment for the expenditure of money was involved, it was required that the other operating companies would write in and get our advice as to whether or not such expenditure or commitment was advisable. They were, as I tried to say, varied in nature. It might be repair of a marquee that might cost $500 or the erection of a theatre that might cost $750,000.

Similarly it involved commitments and changing policy for bookings, and things of that kind, but these requests would come in from the operating men in the form of letters, and would go to Mr. Gambee, Mr. Cox, and their staff, or it would be screened and gone over by financial people to come out with some balanced judgment as to whether or not it was a good thing.

Defendant's Witness, John P. Edmondson, Direct

Q. After a consideration of these matters was given by the Board of the Agency Corporation in New York, it would advise the operating people in California, and elsewhere, as [107] to the action which had been taken at the Board meetings? A. Yes, sir. And I usually wrote those letters. Those letters would simply say that we recommend that certain action be taken, and we appreciate the fact that we couldn't pierce the corporate veil, but we certainly made a recommendation.

Q. Do you recall sending letters of that sort with respect to theatres which were located in California? A. Yes, sir, quite a few of them.

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Q. Now, Mr. Edmondson, going back to National Theatres Corporation, the defendant here, you have testified, I believe, that all meetings of the Board of Directors of that corporation were held in New York City up to some time in 1936. Is that correct? [108] A. Yes, sir.

Q. Now, after this date in 1936 where were those meetings of the Board held? A. In Jersey City, sir.

Q. Where were they held over there? A. I believe they were held in a theatre. I don't know the address. It was the old State Theatre on Journal Square some place.

Q. In Jersey City? A. In Jersey City, sir. I don't recall the exact address.

Q. Did the company, National Theatres Corporation, maintain any office there? A. No, sir.

Q. Well, where did it have its meetings? Where did it have these meetings? A. Mr. Skouras, through other connections, I think, operated through one of his brothers, in connection with this theatre, the manager simply set aside a very small office up on the mezzanine floor of the theatre, so that whenever we would hold these meetings we would all get in the car and drive over there, and then after the meeting was over get in the car and come back.

We had no offices there. It was simply a small anteroom off the mezzanine floor of the State Theatre. And I might add it was a pretty sorry room at that.

Q. Was this period you testified to, was that subsequent [109] to the time that the offices, at which certain of the personnel were employed in Jersey City, had been given up? A. Yes.

Q. At this period when these Board meetings were held in this anteroom in the State Theatre Building, did National Theatres have any personnel or employees in the State of New Jersey? A. No, sir. We only had employees there for the brief period of a year and a half which I previously mentioned.

[110] Q. Now, Mr. Edmondson, in the period between 1932 and 1942, do you recall any activities of Mr. Spyros Skouras, president of or vice president of the company during those years with respect to film licensing agreements for the various theatres? A. Yes, sir.

Q. Would you describe, if you recall, what services Mr. Skouras performed in that connection?

> Mr. Kostelanetz: Your Honor, I don't know if this is a new chapter, but I respectfully object as to the materiality of this line of questioning.
>
> The Court: Overruled.

A. Under Mr. Skouras' immediate supervision, the film-buying department for all the theatre chains was maintained at 444 West 56th Street. He was the final word on whom the Board relied to consummate the contracts, procure the products to service those theatres for long periods of time, he negotiated the terms with all the other major producing and distributing companies and made the recommendations to the Board which were followed.

Q. And were those services performed mainly in New York? A. I should say yes, sir.

Defendant's Witness, John P. Edmondson, Direct

All the other selling facilities were here; it was [111] the only place he could do it.

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[112] Q. Now, with respect to these services which you said Mr. Skouras performed in connection with these film licensing agreements, did he have any personnel assisting him in this work? A. Yes, sir.

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[113] Q. And where were their offices? A. At 444 West 56th Street, New York City.

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Q. Do you know, Mr. Edmondson, under whose supervision and control, if any, these various assistants of Mr. Skouras worked?

Mr. Kostelanetz: I object to it, your Honor.

The Court: Overruled.

A. Yes, sir. The ones that I mentioned and others, too, worked under Mr. Skouras' direct supervision and control.

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[114] Q. In connection with these film licensing agreements, Mr. Edmondson, would you tell the Court the general nature of business operations of that sort? A. Yes, sir.

Mr. Kostelanetz: Your Honor, I object.

The Court: I don't understand the question.

Mr. Pride: My question is, your Honor, what agreements, what was the nature of these arrangements which the witness said were negotiated by Mr. Skouras to provide for the licensing of motion pictures to be shown in the various theatres of the company.

The Court: If you had some of these contracts, that would make it clear.

Mr. Pride: I was asking the witness about his recollection, I was not concerned with the details of any contract, Judge, but as to if he knew how these contracts were negotiated and how they were executed, that was all.

Mr. Kostelanetz: I object to that, your Honor.

The Court: He may say how they were negotiated and who negotiated them.

[115] By Mr. Pride:

Q. In line with his Honor's ruling, do you know how these film licensing agreements were negotiated, Mr. Edmondson? A. Yes, sir.

Q. And by whom? A. Usually Mr. Skouras would call a meeting at which his assistants were present and the general sales manager of one of the major producing companies would come in. He would also bring in his assistant.

Then they would take a list of these theatres that were buying this, for some four or five hundred of them, and they would say we want to play this at a certain time, and then they would have sheets for that which would show the clearance of that theatre, whether it played ahead of a theatre or behind the theatre.

It took a vast amount of negotiation and working out to come to a final, overall arrangement.

Now, those sheets that they would work on finally became a part of a master contract which was signed, and that is what they did.

Q. Thank you. Those conferences, Mr. Edmondson, with these representatives of the distributor were held generally in New York; is that right? [116] A. Yes, sir.

It is my understanding then that all the general sales managers of all of these major distributing companies had their offices here in the city, and this was the most feasible place to do it.

Q. Now, you have referred to contracts which were master agreements, I believe you called them? A. Yes.

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Q. Now, Mr. Edmondson, the period between 1932 and 1942, do you know whether the defendant National Theatres Corporation maintained a bank account in New York City? [117] A. Yes, sir.

Q. Sir? A. I am not clear as to whether it was for that entire period but my recollection is that practically the only one we did have was at the Chase National Bank, 18 Pine Street.

Mr. Kostelanetz: Your Honor, may that not be susceptible to direct proof as to dates?

The Court: Do you want to go through all of the details of proof? Do you want the president of the Chase Bank to come in and say that the defendant had a bank account there?

I will overrule the objection.

Here is an officer who had been there for twenty years; he ought to know whether there was a bank account in New York.

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[118] Q. Mr. Edmondson, do you know whether or not the defendant National Theatres Corporation borrowed any money from the Chase National Bank during this period?

Mr. Kostelanetz: I object to this entire line of questioning, your Honor.

The Court: Well, what is the purpose? Is it for the purpose of showing that they did business in New York?

Mr. Pride: Conducted business, your Honor.

The Court: I will overrule your objection.

A. Yes, sir.

Q. Did National Theatres Corporation arrange for loans to be made to its subsidiary companies by the Chase National Bank? A. Yes, sir.

Q. Did it guarantee advances to these subsidiary companies [119] by the bank? A. Yes, sir.

Q. Did it pledge stock of these subsidiary companies to secure these loans? A. Yes, sir.

Q. I have asked you, Mr. Edmondson, about Mr. Charles P. Skouras, whom I believe you said maintained his office in Los Angeles. Do you know in what capacity he acted for National Theatres Corporation in the period during which you were associated with the company?

Mr. Kostelanetz: Your Honor. I respectfully object to the form of the question and to the area of interrogation.

The Court: Overruled.

A. He and his brother had a contract with National Theatres Corporation, as I recall it. Charles P. Skouras was president of Fox West Coast Theatres Corporation.

In the capacity of acting for National, I am not clear as to just what action he took on behalf of National other than the fact that he was employed by National, with no corporate title, and that if his brother would call upon him to do something on behalf of National, well, I couldn't answer that.

Mr. Kostelanetz: Your Honor, I take it I may move to strike out the witness's answer.

The Court: Denied.

[120] Q. Do you know whether there were communications between Mr. Spyros Skouras, the president of the company in New York, and his brother, Charles P. Skouras, in Los Angeles?

Mr. Kostelanetz: I respectfully object, your Honor.

The Court: Overruled.

A. Yes, sir, and I say it was voluminous correspondence.

Q. Do you know whether there were telephonic communications between them? A. It is my impression that they talked to each other daily by telephone.

Mr. Kostelanetz: Your Honor, I respectfully move to strike out the answer.

The Court: Denied.

Q. Now, did Mr. Spyros Skouras, the president of National, make trips to California in the course of this period when you were an officer of the company? A. Yes, sir, frequently.

Q. Now, do you know what activities he engaged in on those trips to that state?

Mr. Kostelanetz: If your Honor pleases, I respectfully object to the question.

The Court: You may ask whether the witness was [121] there at the time as to all of these activities.

Mr. Pride: All right, your Honor.

By Mr. Pride:

Q. Would Mr. Spyros Skouras, the president of the company, report to the Board of Directors of the company concerning trips which he made to California?

Mr. Kostelanetz: If your Honor please, the minutes are here; it seems to me they would be the best evidence.

The Court: The minutes might not even record the facts, that is, such details as might come up for inquiry here.

I will overrule the objection.

A. Yes, sir, he would report back to the Board.

He usually came back with many series of letters or proposals, and in the process of his discussions with the operating people, they would either change the policy on booking pictures into theatres, or they would discuss the question of a new marquee or the question of building new theatres—proposals of that kind, and he would bring them back.

He would also make a report to the Board of Agency.

Q. I think in your last answer, Mr. Edmondson, you said he would report on these matters to the Board of the Agency Corporation. Let me ask you if he would make similar reports to the Board of National in the period prior to the [122] formation of the Agency Corporation?

Mr. Kostelanetz: I object to that, your Honor, as leading.

The Court: It is leading.

Mr. Pride: I beg your pardon?

The Court: It is leading. I sustain the objection.

By Mr. Pride:

Q. Would Mr. Skouras report to National Theatres Corporation, to the Board of Directors of National Theatres Corporation?

The Court: That is following his activities or during the time of his visits to California.

Mr. Pride: Thank you, your Honor.

A. I don't recall that he did, but he would at that time, he would usually report to Theatres, National Theatres, the essence of something that had been pretty much watered out and shaken down before it got to Theatres, and then it was probably a process of ratification at that point.

Q. Thank you. Mr. Edmondson, are you familiar with a Mr. John J. Sullivan in this period from 1932 and the time of Mr. Sullivan's death in 1940, I believe? A. Yes, sir.

Q. Who was he? [123] A. He was a film buyer for the chain.

Mr. Kostelanetz: I am sorry, I didn't get the last word.

A. He was a film buyer for the chain of theatres.

Mr. Kostelanetz: May I respectfully move to strike out "the chain of theatres"? I mean if there is an employer identified, I have no objection, but I just don't, in the connection of what we are litigating here, I don't know what "chain" means.

The Court: It has been referred to several times in the course of Mr. Edmondson's examination.

I will overrule your objection.

Q. Well, to clarify the point that Mr. Kostelanetz seems concerned about, you used the word "chain"; were you referring to all of the theatres in which National Theatres Corporation was interested? A. Yes, sir.

Q. Now, where did Mr. Sullivan maintain his office? A. First in California—

Q. Sir? A. First in California, which was his home, but he would spend anywhere from three to four, five, perhaps six months of the year here to participate with Mr. Skouras in the negotiations that I have described for the buying of film.

[124] Q. The remainder of the time he had his office in Los Angeles; is that right? A. That is right, sir.

Q. And did he perform those same services you have described in the film-buying department in that state? A. Yes, sir.

Mr. Pride: Will you mark this for identification, please; it is an agreement between John J. Sullivan, Los Angeles, dated New York, New York, December 5, 1935, executed by Mr. Sullivan and by National Agency Corporation, by Mr. Skouras, president; Mr. Edmondson, secretary, and guaranteed by National Theatres Corporation, which guarantee is signed in New York, December 5, 1935, by Mr. Skouras and Mr. Edmondson.

(Document marked for identification as Defendant's Exhibit B, as of this date.

Q. I show you, Mr. Edmondson, Defendant's Exhibit B for identification and ask you if you recognize that document? A. Yes, sir. It is an employment contract between National—

Q. Pardon me, Mr. Edmondson, you said you did recognize it? A. Yes, sir.

Mr. Pride: I offer it in evidence.

Mr. Kostelanetz: Your Honor, I respectfully object to this since this is not a contract with the defendant, [125] except for a guarantee, and apparently the defendant is trying to pierce its own corporate veil, which the cases say it cannot do.

The Court: I will overrule the objection, it will be received.

(Agreement between John J. Sullivan, Los Angeles, dated New York, New York, December 5, 1935, executed by Mr. Sullivan and by National Agency Corporation, received in evidence as Defendant's Exhibit B, as of this date.)

Defendant's Witness, John P. Edmondson, Direct

By Mr. Pride:

Q. That agreement, Mr. Edmondson, was executed by you as the secretary of National Agency Corporation? A. Yes, sir.

Q. And was the guarantee of National Theatres Corporation executed by you? A. Yes, sir.

Q. And where was that document executed? A. In New York, December 5, 1935.

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[126] Q. Do you know whether Mr. Sullivan entered upon employment pursuant to the provisions of this agreement, Mr. Edmondson? A. Yes, sir, he did.

Q. And do you know how long he continued in that employment? A. I believe he continued until his death.

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Q. Mr. Edmondson, you have testified that you were the [127] secretary of this National Agency Corporation from the time it commenced to function in or about the beginning of 1936? A. Yes, sir.

Q. And did you keep the minutes of that corporation, keep the minutes of the meetings of the Board of Directors of that corporation from that time down until the time that you left the company? A. Yes, sir.

Q. Mr. Edmondson, I show you a book purporting to be the minutes of the National Agency Corporation, and ask you if you can recognize that volume as the official volume, as an official volume of the minutes of the corporation? A. Yes, sir.

Mr. Kostelanetz: Your Honor, I just want to object again to any line of questioning dealing with the National Agency Corporation.

The Court: I will overrule the objection.

A. Yes, sir, I did.

Q. Now, I show you similar volumes labeled Volume 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

(Witness examines books.)

The Court: What is the question?

Mr. Pride: I am asking him if he can identify those, your Honor, as the official corporate records [128] reflecting the meetings of the Board of Directors of the company from its inception to the time he ceased to be secretary.

A. Yes, sir, I identify these as the minutes of the Board of Directors and the stockholders of National Agency Corporation, which name was changed to National Theatres Amusement Company, Inc., and it starts in from the period of organization and runs down to March of 1942, I believe that was the last minute.

Q. And those volumes, which I now offer as Defendant's Exhibit C, those ten volumes contain only the minutes of meetings of the Board and of the stockholders of this company, National Agency, during this period; is that correct? A. Yes, sir.

Mr. Kostelanetz: If your Honor please, may we have these minutes marked for identification?

The Court: Why do you go through that again? I shall overrule your objection. They will be received as having been identified as minutes of the National Agency and the changed name, but in respect to any material within the covers of each of these volumes, the materiality or relevancy will have to be established before such pages may be read.

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[129] The Court: Now, you may offer as Exhibit C, say page 218, and that page will be received if it appears that the record is relevant or material to the issue of this case; is that understood?

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[131] Q. Mr. Edmondson, reference has been made here to a case entitled *Hillside Amusement Company v. Warner Bros. Pictures, et al.*, and in the record of which case it appears that there is an affidavit signed by you in connection with a motion which was made by the defendant National Theatres Corporation to set aside the service upon it.

Do you recall that litigation, Mr. Edmondson? A. Yes, sir.

Q. Do you recall that you executed such an affidavit in that case? A. Yes, sir.

[132] Q. Now, you have seen this affidavit, have you not, Mr. Edmondson, since the time you executed it? A. Yes, sir. I was shown the affidavit first by plaintiffs' attorney who visited my office, and then I think by your office, you also visited and showed me the same affidavit.

Q. Do you recall that in that affidavit certain statements were made that National was not doing business in New York, had no office in New York? A. Yes, sir.

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Q. Well, after this motion was filed, Mr. Edmondson, what happened with respect to any determination of that motion?

Mr. Kostelanetz: Objected to, your Honor.

The Court: I don't see what difference the determination of a motion has to do with what was said in the affidavit.

Mr. Pride: Let me press the point.

[133] Q. Do you recall, Mr. Edmondson, whether that motion to quash was ever decided?

The Court: What was the motion? I don't know what the motion was.

Mr. Pride: The motion was, your Honor, the motion was one to set aside service, as I will show, and the motion was made and the matter was referred to a special master. The company and its attorneys, on a review of the facts involved, abandoned the motion, came in and appeared and answered in the action, and that, I submit, is particularly significant as indicating the company's decision, its determination that it was subject to service in New York, despite the fact that it had filed this motion.

In that connection, your Honor, may I simply say that the point Mr. Kostelanetz is urging here somewhat eludes me because supposing in this case, sir, that National had not abandoned its position and appeared, and supposing that the issue had been determined adversely, then I submit that the fact that it advanced the point would be in no way an estoppel as to the fact it was doing business here.

The Court: Mr. Pride, that argument doesn't meet [134] the position that Mr. Kostelanetz takes, the position being that an affidavit was filed which is inconsistent with the present position of the defendant, and that is in the issue relating to the Statute of Limitations.

Mr. Pride: Yes, your Honor.

The Court: Now, Mr. Edmondson made an affidavit, and that is there. It doesn't make any difference what disposition was made subsequent thereto. He isn't interested in that.

Mr. Pride: I know he isn't, but I submit, your Honor, the fact that the company and its attorneys abandoned the position, determined that it

could not be maintained, although it had been raised in the motion papers; their ultimate decision in abandoning it certainly is significant.

The Court: You will have to give authority, and very convincing authority, on that question. Just as I suggested this morning in the matter of briefing the point in respect to inconsistent positions taken, where you advocated that because in a pleading there was a denial and that didn't bind you, that that was merely lawyers' work and didn't go to the fact, I said to you then that you would have to brief that point and show me some authorities; so, likewise I said to Mr. Kostelanetz [135] he must be prepared on the other side. Again in respect to this Southern District action: If in the affidavit the witness said something, well, the fact that the defendant withdrew its motion doesn't mean that the affidavit of Mr. Edmondson was reformed by that and thereby to prove it was doing business in New York.

Mr. Pride: Of course, your Honor, I do submit that that fact is very material.

The Court: It may be.

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[138] Q. What were the conditions under which this affidavit was made, Mr. Edmondson? A. The attorneys for National Theatres Corporation prepared the affidavit in this suit that was pending—I forget the title of it, I always referred to it as the Hillside case. The affidavit I was informed was consistent with the tax position that the company had tried to maintain consistently on the advice of counsel, and I read the affidavit at the time I executed it and I believed it to be true, which was perfectly consistent with what we were trying to

maintain. I understood that it was to be used in a suit that was pending in California and that it would be submitted there.

[139] Later, in talking to counsel, they said that they had finally decided not to use the affidavit, for the simple reason that they did not want to test whether or not National was doing business in New York or out there at that time. They felt the facts as would have to be adduced later on and my affidavit which stated conclusions which the facts would not sustain fully—

Mr. Kostelanetz: Your Honor, I respectfully move to strike out the conclusionary part of this answer.

The Court: It is a proper response to the question, and I will overrule your objection, and of course deny your motion.

Mr. Kostelanetz: Yes, your Honor.

By Mr. Pride:

Q. Now, Mr. Edmondson, I neglected to ask you yesterday if you recall whether or not there was in existence during the time that you were secretary of National Theatres Corporation an Executive Committee of the Board of Directors of that company? A. Yes, there was.

Q. I show you two books purporting to be minutes of meetings of the Executive Committee of National Theatres Corporation, and I ask you whether you can identify those books as the original and official records pertaining to the meetings of that Committee? [140] A. Yes, sir, these appear to be those minute books. There are two of them.

Q. And they were kept in the regular course of business? A. Yes, sir.

Mr. Pride: I ask to have them admitted in evidence as Defendant's Exhibit D, being two minute

books of the Executive Committee of National Theatres Corporation.

(Two minute books of the Executive Committee of National Theatres Corporation received in evidence, as of this date.)

Mr. Kostelanetz: Your Honor, may we have the same direction with regard to these minute books that we had yesterday with regard to National Agency minute books?

The Court: Yes.

Mr. Pride: In that connection, your Honor, and in line with your suggestion, we have prepared a summary of the items which are reflected in the minute books as to which we wish to direct attention. We have given Mr. Kostelanetz a copy of that summary. It is as yet not quite complete, but it will be.

By Mr. Pride:

Q. Mr. Edmondson, do you know whether or not National [141] Theatres guaranteed any leases of theatres in California? A. Yes, sir, I believe there was one, to my knowledge, the San Diego, California, San Diego, California.

Mr. Pride: I ask to have marked for identification two instruments, one entitled "Consent of Guarantor," dated August 28, 1933; the other, "Consent of Guarantor," dated August 20, 1937.

(Instruments referred to marked for identification as Defendant's Exhibit E, as of this date.)

* * * * * * *

Q. Mr. Edmondson, I show you Defendant's Exhibit E for identification and ask if your signature appears upon those documents? A. Yes, sir, they do.

Defendant's Witness, John P. Edmondson, Cross

The first document as secretary of WESCO, which was signed the 28th day of August, 1933; the second document signed the 20th of August, 1937, as secretary of National Theatres Corporation.

Q. And do those documents recite that WESCO Corporation or National Theatres Corporation was the guarantor of the lease to the San Diego, California, in San Diego, California? A. Yes, sir, they do.

Mr. Pride: I offer them in evidence.

Mr. Kostelanetz: If your Honor will bear with us just a second.

[142] Your Honor, I respectfully object to it only under our general theory of immateriality, that is that the guarantee does not show the doing of business or the transacting of business.

The Court: I will overrule the objection.

(Documents previously marked for identification now received in evidence as Defendant's Exhibit E, as of this date.)

* * * * * * *

Cross Examination by Mr. Kostelanetz:

Q. Mr. Edmondson, you told the Court initially that you lived in Scarsdale, New York? A. Yes, sir.

Q. And that you worked in New York City; is that right? A. Yes, sir.

Q. And that you went to work for WESCO or National Theatres back in 1930; is that right? A. I believe it was in the fall of 1929 that I went to work for Twentieth Century-Fox.

[143] Q. I see.

Then you stayed with WESCO until, or National, until 1942, when you went off to the Army; is that right? A. I stayed with the associated companies. I was paid

by one initially, and I got on the pay roll of National Theatres Amusement, I believe it was, in 1935, but continuously I worked with that group of companies over that period of time.

Q. Now, tell us, you first went to work for Fox Film Corporation, did you not? A. That is correct, sir.

Q. In the office of the secretary of the company? A. In the office of the general counsel.

Q. And then you became secretary of WESCO; is that right, in 1932? A. I believe it was in 1934.

Q. In 1934? A. Yes.

Q. Before that you were assistant secretary? A. Yes, sir.

Q. And then there was a short lapse when you were no longer the secretary for about a year or so; is that right? A. Yes, sir.

Q. And then you became secretary again, and that is the way it stayed until you left; is that right? [144] A. That is correct.

Q. Now, of course you were secretary for a great many other companies in the Twentieth Century-Fox Pictures; is that right? A. Yes, sir, I was. A great many, I don't know how many there were, but there were certainly quite a few.

Q. Would you say between half a hundred and one hundred, would I be about right? A. I would say around fifty, if I have to take a figure.

Q. And generally during that same period, in so far as Mr. Spyros Skouras or Charles Skouras were concerned, is it correct that they, too, were officials of half a hundred or perhaps even a hundred corporations?

If you recall, if you don't, it is all right. A. I don't recall the numbers, but they were officials in quite a few companies.

Defendant's Witness, John P. Edmondson, Cross

Q. And generally, sir, you handled minutes for these various corporations, or they were handled under your direction; is that right? A. That is correct.

Q. And it is correct, sir, that you have been a member of the New York Bar for more than a quarter of a century; is that right? A. Well, I think I became a member of the New York Bar, I believe it was in 1930.

Q. You are a graduate of the University of Virginia Law [145] School? A. Yes, sir.

* * * * * * *

Q. And when you became assistant secretary of WESCO, I think you testified on your direct examination that WESCO was a shell; is that correct? A. I don't recall the exact language, but if that is what I said, well, but what I had in mind was it was a holding company—perhaps the term was unfortunate.

Q. Well, let me see if I can help.

The company was a company which simply held the stock of other companies.

Mr. Kostelanetz: I am referring to page 81, page 82.

Q. Is that correct? A. Yes, sir.

[146] Q. And it was more or less "a shell," and that the companies which were owned by WESCO in turn owned stocks in other companies; is that right? A. That is correct, sir.

Q. So that this was not only a parent, but a grandparent? A. Yes, sir.

Q. And in many instances a great grandparent; is that right, sir? A. That is correct, sir.

Q. And I think you testified that the function of the company was just to hold stocks, collect dividends when declared by subsidiaries, and pay out dividends when necessary; is that right? A. Yes, sir, that was roughly it.

Defendant's Witness, John P. Edmondson, Cross

Q. Now, it is correct, sir, is it not, that, well, that the same situation obtained in 1933 sir: If you can answer that question? A. It is roughly it.

Q. And in 1934, sir?

Mr. Pride: Has the witness finished his answer?

A. The answer that I would give there is that it is not purely a holding company because you had to do something with the money when you got it, and sometimes you had to borrow money, as I have testified. I tried to be as forthright as I could as to what we did.

[147] Q. We apreciate that, Mr. Edmondson. Now, I think your answer is the same with regard to the year 1935; is that correct, sir? A. In 1935, I believe it was, we had the reorganization at which time loans that had been made to WESCO and National had to be washed up and exchanged for stock. The claims of subsidiary companies which National had guaranteed also came in that exchange, and as I recall the year 1935 was a rather important year—it was either in 1935 or 1936.

So we didn't just sit there during that time, the scene changed, the situation changed.

Q. But at any rate during this period, let us say 1933, 1934, 1935, WESCO or National Theatres as it was then becoming known, is it correct, sir, that it didn't even have a telephone in the City of New York? A. I don't recall about the telephone, I never looked it up. All the telephone calls came into the Twentieth Century-Fox switchboard.

Q. I meant, sir, a telephone in its own name. A. I have no knowledge about that because I never looked it up. I think I did speak to someone about it, one of the lawyers here, and they told me that it was listed at one time.

Q. At one time?

Defendant's Witness, John P. Edmondson, Cross

[148] Well, fortuituously, Mr. Edmondson, we have subpoenaed the Public Utility bills of National Theatres, and that will certainly show whether National Theatres had a telephone in the years 1930, 1931, 1932, 1933, 1934 and 1935.

Mr. Kostelanetz: Would you help us, Mr. Pride?

Mr. Pride: I was going to object to the form of the question, as to whether the Public Utility bills would show that National Theatres had a telephone.

I will, to help you out, Mr. Kostelanetz, I will state that as far as we have been advised, National Theatres Corporation did not have a listing in the New York telephone directory until some time in 1934 or 1935; that thereafter there was a listing with the notation "See National Theatres Agency Corporation."

Mr. Kostelanetz: Well, perhaps I can help you, Mr. Pride.

Mr. Pride: Maybe the year is 1935 and 1936, but that is the situation.

Mr. Young: 1935.

Mr. Pride: 1935, yes.

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[149] Q. Now, in the latter part of 1935, around December, around December, 1935, was National Agency Corporation formed which was subsequently called National Amusement Corporation? A. Yes, sir.

Q. Now, at the time that National Agency was formed, Mr. Edmondson, did National Theatres contract with Charles Skouras and Spyros Skouras, a contract for their services? A. Yes, sir, there was a contract, the date of which I can't identify at this present time: it would be the Skouras employment contract, it came about that time.

[150] Q. I would like, sir—

Defendant's Witness, John P. Edmondson, Cross

Mr. Pride: Will you identify that for the record as to what contract you are talking about and between whom?

Mr. Kostelanetz: If your Honor please, I hold in my hand two photostats, the originals are with counsel for the defense.

The contract is of December 2, 1935, between National Agency Corporation and National Theatres Corporation, which relates to services of Spyros and Charles Skouras.

And I hold another paper in my hand dated December 2, 1935, entitled Assignment of Skouras contracts, in letter form, from National Theatres Corporation to National Agency Corporation, and I respectfully offer these two papers, which had originally come from the files of the defendant.

Mr. Pride: No objection.

The Clerk: As one exhibit or two exhibits?

Mr. Kostelanetz: As two exhibits.

(Contract dated December 2, 1935, between National Agency Corporation and National Theatres Corporation referred to was received and marked Plaintiffs' Exhibit 19 in evidence.)

[151] (Assignment of Skouras contract dated December 2, 1935, referred to was received and marked Plaintiffs' Exhibit 20 in evidence.)

Mr. Kostelanetz: For the purposes of refreshing the witness's recollection, your Honor, is it possible for counsel to give me the counterpart of those contracts?

(Paper handed to Mr. Kostelanetz.)

Mr. Kostelanetz: May I hand this to the witness.

(Paper handed to the witness.)

Defendant's Witness, John P. Edmondson, Cross

Q. Now, Mr. Edmondson, you were around when these agreements and assignments were made up? A. Yes, I was around.

Q. And in December, 1935, and I call your attention to the so-called holding company service contract of December 2, 1935, between National Theatres and National Agency, and I ask you if it is a fact that pursuant to that contract all rights that the National Theatres Corporation had to the services of the Skouras brothers were assigned to the National Agency Corporation?

Mr. Pride: I object to the form of the question, your Honor.

The Court: Overruled.

A. It is my understanding that the accounting was assumed by [152] this National Agency Corporation, and the services as well. National Theatres still was liable for the payments under the contract, but the actual execution, the forward projection of the use of these men and their services, and the complicated accounting provisions were all assumed by National Agency, but nevertheless National Theatres remained liable.

Q. National Theatres remained liable on the guarantee? A. They were the primary people that were liable, and they simply assigned the rights of fulfillment to a wholly-owned subsidiary, which they controlled.

Q. So it is correct that they assigned all of their rights to the services of the two gentlemen, is that right? A. Other than the right that they were primarily liable to these people, and they were the ones that were responsible—

Q. That, sir, is a right? A. Yes.

Q. Do you mean obligation? A. That is right.

Q. Isn't it correct, sir, that after the contract was executed the managers were paid by National Agency Corporation? A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. Now, is it also correct, and I ask you, Mr. Witness, respectfully to look at page 2 of the assignment of the Skouras [153] contract dated December 2, 1935, about nine lines down, starting with the word "managers." Do you see it? A. Yes.

Q. The "managers," and that is the Skouras brothers, is that right, sir? A. Yes, sir.

Q. In rendering services to or through you; that is addressed to National Agency, shall act not as our agents, not as the agents of National Theatres Corporation, but solely as your agents, Agency agents and employees, in such official or executive capacity as your Board of Directors shall determine. You see that. Is that right, sir? A. Yes, sir.

Q. So that at this point, sir, is it correct that the Skouras brothers not only worked for the National Agency, subsequently called Amusement, but for the half hundred other subsidiaries, sub-subsidiaries, sub-sub-subsidiaries, and sub-sub-sub-subsidiaries of this economic group, if you will? That is correct, isn't it? A. Yes, sir. I was just trying to be accurate and think my answer through.

This Amusement—this Agency company that you refer to here also had contracts with other Agency companies, who in turn had other agency contracts with other operating [154] companies. My recollection as to what those contracts provided is scarce. I don't know. So when you asked me the question whether or not they in fact acted as the agents for, say, a twice-removed subsidiary, I should think at that time it would depend upon the language of these various interlocking company contracts.

Q. I would not be overstating the fact that as corporate officers during this period the Skourases, if I may

use a colloquialism, wore half a hundred hats, or perhaps a hundred hats? A. I wouldn't hazard a guess.

Q. Now, in the year 1936, Mr. Edmondson, the situation of the corporation was roughly the same, is that correct, as that—I think you said in 1935 there was a great deal of activity about financing and refinancing? A. Reorganization.

Q. Or perhaps the activity was in 1936 you said? A. I believe it was in 1935 or 1936 that we were virtually insolvent, and the banks had these tremendous claims against us, and we exchanged our obligations for stock, and that type of reorganization went on.

The Chase National Bank, as I recall it, took over about a 58 per cent interest in National, and Twentieth Century Fox was reduced to a minority stockholder of about 42 [155] per cent. I think that occurred in about 1935. I am not sure.

Q. And if that happened in 1935 or 1936, after that things quieted down a little reorganization wise, and is it correct that you then returned to the situation which you described in your direct testimony, at pages 81 and 82, of being a holding corporation, collecting dividends, and paying out when the Board decided it was a good idea to pay out? A. Yes, sir.

Q. And that situation continued into 1938 and 1939, is that correct? A. Yes.

Q. '40, '41, and '42? A. Yes, sir.

Q. From time to time, Mr. Edmondson, after you left and went off in 1942 did you keep in touch with National? A. Well, I wrote to my friends there, Sumner Gambee, Harry Cox. And Spyros Skouras visited in London in '43 or '4. And I saw him.

Q. These people are all your friends? You grew up with them? A. Yes.

. . . . . .

Defendant's Witness, John P. Edmondson, Cross

[157] Q. On direct examination, Mr. Edmondson, you spoke [158] concerning writing certain letters with regard to various actions taken at Board meetings, and that the letters "• • • would simply say that we recommend that certain action be taken, and we appreciate the fact that we couldn't pierce the corporate veil, but we certainly made a recommendation."

Do you recall so testifying, sir? A. This was the Agency Company we are talking about?

Q. In relation to the Agency Company. A. Yes, sir.

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[159] Q. Now, those letters, so that we can be crystal-clear, were letters written on Agency letterheads to various subsidiaries; is that right? A. For the most part they were letters written all on Agency stationery to other Agency companies.

Now, there was an Agency company in the midwest called Fox Mid-West Agency, and there was one out on the coast called Fox West Coast Theatres Agency, and these Agency companies would write in to the National Agency Company asking for [160] their advice and recommendation as to whether or not certain actions or whatever was proposed was advisable under the circumstances. These letters would be presented to the Board of Directors of the Agency Company in New York, and after discussion I would write the letters back and tell them; then on the basis of what I said in the letter, the minutes would be drawn. That is how it would be worked.

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Q. I see. Now, in your direct examination you testified in answer to Mr. Pride's question, at page 110, and more [161] particularly at page 115, that "Mr. Skouras"— I am really reading from page 115— "Mr. Skouras would call a meeting at which his assistants were present and

the general sales manager of one of the major producing companies would come in." A. That line of testimony had to do with the film buying part of my examination.

Q. Yes, sir. A. Yes, sir.

Q. And Mr. Skouras "• • • would make a list of these theatres that were buying this, for some 400 or 500 of them, and they would say we want to play this at a certain time, and then they would have sheets for that which would show the clearance of that theatre, whether it played ahead of a theatre or behind a theatre."

Is that correct, is that right? A. Yes, sir, that is what I said.

Q. And all of this was put on a master sheet and a master contract was signed, that is what they did; is that correct? A. In film buying?

Q. Yes. A. It is my understanding of the question.

Mr. Kostelanetz: Now, this master contract, do you have some copies here of the master contracts?

Mr. Pride: No, we can get you one, I am sure.

Mr. Kostelanetz: You could?

Mr. Pride: I say I hope we can.

Mr. Kostelanetz: All right.

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[161a] Q. This master contract, sir, was that signed by you? A. I don't recall.

Q. Well, who was the contract signed by, sir? A. Usually Mr. Skouras.

Q. And if I may be permitted to use my colloquialism, which hat was Mr. Skouras wearing at the time that he signed it, the president of Agency? A. President of the Agency Company.

[162] I might add that in something that was as large as that, probably there were other contracts that were signed locally by the local Agency Companies.

Defendant's Witness, John P. Edmondson, Cross

Q. But this whole operation, as I understand your testimony, was directed right then and there by Mr. Skouras, Mr. Spyros Skouras? A. Without a doubt.

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[167] Q. Would you state, Mr. Edmondson, whether the conversations and the problems concerning the tax status of National Theatres Corporation in New York or California were recorded in these eight volumes of minutes which you have brought to court here, or rather counsel has brought to court? A. No, sir, I don't think they were.

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[168] Q. The fact of the matter, sir, was that you had a [169] question as to your tax position in New York and California in the mid-thirties; is that right? A. Principally the concern was over New York.

Q. As to California, sir, there was no concern; is that right? A. I don't recall any, there may have been some consideration by the attorneys themselves, but it didn't attain any degree of importance as far as I was concerned.

Q. Now, so far as New York was concerned, there came a time when an action entitled "Hillside Amusement Company against Warner Brothers Pictures and others" was brought to your attention; is that right? A. Yes, sir.

Q. And it was brought to your attention by a deputy marshal serving you with a copy of the summons; is that correct? A. Yes, sir.

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Q. Now, when the summons was handed to you, I take it that you called in general counsel; is that right? A. I imagine that I made a note on it that it had been served

on me at a certain time, on a certain date, and then sent it down to general counsel to let them carry it from then on.

[170] Q. And the general counsel thereafter came back to you, Mr. Edmondson, and said in sum and substance that we need an affidavit? A. Yes, sir.

Q. And when they came back to you and sought out an affidavit from you, you complied and drew an affidavit; is that right? A. No, sir.

Q. It was drawn for you? A. Yes, sir.

Q. Before the affidavit was drawn, did you sit down with counsel and go over the facts? A. Of the whole case?

Q. Well, of what you were going to put in the affidavit. A. Yes, I talked with someone there. I don't recall who it was, and they did ask me if I would sign the affidavit and generally what would go in it, and then the affidavit was prepared.

Q. And you knew, did you not, that the affidavit would be submitted to a court for the purposes of an order to show cause to vacate service? A. Yes, sir.

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[171] Q. And it is correct, is it not, sir, that National Theatres Corporation had a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey? A. At what time, sir?

Q. Sir, your affidavit is dated March 13, 1941. A. Yes, sir.

Q. And is it also correct, sir, that at all times since December 29, 1934, the principal office of National Theatres had been in Jersey City, New Jersey; is that correct, sir? A. I would say at that time it was, and that is what we attempted to maintain.

Q. And it was correct, sir, that "No meetings of stockholders, directors or the auditing committee are

held in the Southern District of New York"? A. During 1941, all the meetings were held in Jersey City.

Q. There you drew a difference, sir, between 1941 and the prior sentence where you say, "At all times since December 29, 1934, the principal office of National Theatres has been in Jersey City, New Jersey." A. Well, I don't recall just when we moved it over there. The facts would speak for themselves. We established the office over there in 1934, I believe, and then we stayed there for a year and a half, and we moved it back, so we are now at 1941 where at the time I made that affidavit, and [172] everything I said in there I believed to be true, and that was the position we maintained.

Q. And you believed it to be true that "At all times since December 29, 1934, the principal office of the company was in New Jersey," that you believed to be true in March of 1941? A. Yes, sir, that is what we tried to maintain.

What it involved, Mr. Kostelanetz, was that we had been doing business in one way, and tax lawyers had told us to change, and we were trying to change over and make those things real, and we tried to do it to the very best we could.

Q. There isn't anything in this affidavit of March 13, 1941, which is untrue? A. Not at the time I executed it; I wouldn't have signed it.

Q. Now, is it correct, sir, that while you had an office at 444 West 56th Street, where the summons and complaint were served on you, that that office was not the office of National Theatres Corporation? A. That is correct, that is what we maintained at that time.

Q. And that you "transacted no business for National Theatres Corporation in the Southern District of New York"; that is correct, too? A. That sentence, you said

Defendant's Witness, John P. Edmondson, Cross

I transacted no business, and [173] I think there is another one there where it says none of the other officers transacted business there.

Q. Yes, that is a correct statement? A. That was a correct statement at the time I made it, that is what we attempted to maintain.

Q. And you said that none of the "officers, directors or employees of National Theatres transacted any business on behalf of National Theatres in the Southern District of New York"; that was a correct statement, too, sir? A. Yes, sir.

Q. Now, it is a correct statement, sir, that "National Theatres Corporation engaged in no business other than holding stocks and other securities"; that was a correct statement, wasn't it, sir? A. At the time I made it, that is what we attempted to do.

Q. And as a matter of fact, you kept all the securities in vaults in Jersey City, New Jersey; isn't that right? A. Yes, sir.

Q. When you maintained an office "at which all directors' meetings, stockholders' meetings and meetings of the auditing committee were held"; is that correct? A. Yes, sir.

Q. And the stock record books were kept in Jersey? A. Yes, sir.

Q. And it is correct, sir, that "National Theatres Corporation does not maintain an office of any sort in New [174] York, New York, or anywhere else within the jurisdication of the District Court of the United States for the Southern District of New York"? A. In 1941, that is what we maintained.

Q. It is correct, sir, that "National Theatres was not engaged in the exhibition of motion pictures during this whole time"? A. That is correct, sir.

Defendant's Witness, John P. Edmondson, Cross

Q. And it doesn't "engage in the business of buying or selling any commodity or enter into any license agreements for exhibition of motion pictures"? A. Not at the time I executed that affidavit, that is in 1941.

[175] Q. And "you own no interest, directly or indirectly, in any theatres"; is that correct, sir? A. National Theatres?

Q. Yes, "within the territorial district of the Southern District of New York"—I am sorry. A. That is correct, sir.

Q. That is correct? A. Yes.

Q. Now, you stated, sir, in this affidavit in support of the proposed order to show cause that you had "consulted general counsel for the company" and you give their advice; is that correct?

You also state there what their advice amounts to, as to whether or not the company was transacting business in the antitrust sense. A. Yes, sir.

The Court: In the antitrust sense, or in the tax sense?

Mr. Kostelanetz: I inquired in the antitrust sense, your Honor.

A. There is a provision in the affidavit that states, that the attorneys put in, that they had advised us in this matter, and I assume that is what you are referring to.

Q. Yes.

Well, is it correct that they did not, that in the [176] opinion of the attorneys—well, could I ask you who specifically, which attorney? A. I believe Mr. Caskey was the architect of the defense in the Hillside case.

Q. Now, in that case, sir, did Dwight Harris advise you that in their opinion National Theatres Corporation does not transact business within the territorial jurisdiction of the District Court of the United States, District of New York?

Defendant's Witness, John P. Edmondson, Cross

Mr. Pride: I object to the form of the question.
The Court: I will overrule the objection.

A. The affidavit that you have there before you, Mr. Kostelanetz, well, I don't recall all the terms of it, but there was a provision there to the extent of what they did advise, and I included it in the affidavit.

If you are reading from it correctly, that is what I said.

I don't have it in front of me.

Q. Yes.

Well, I say the business of being advised was a fact, in other words, you were so advised? A. Yes, sir.

Q. And were you advised that this corporation was not "an inhabitant nor could it be found within the territorial jurisdiction of said Court"? [177] A. I don't have the affidavit in front of me.

Q. I don't mean to take advantage of you.

Please look at the affidavit.

That is the last paragraph.

(The affidavit was then handed to the witness.)

A. Yes, sir, that is what it says.

Q. While you have the affidavit in front of you, sir, is there one word in that affidavit concerning any tax advice or tax position? A. No, sir, there is not.

* * * * * * *

Q. Having seen the affidavit and had your recollection refreshed, is it correct that you were advised that National Theatres was not "an inhabitant nor could be found within the territorial jurisdiction of the Southern District Court"? A. Yes, sir.

Q. Now, this affidavit, Mr. Edmondson, was dated March 13, 1941, and it appears as part of Exhibit 5 that an attorney, William W. Owens, gave an affidavit on July 9 of 1941.

Defendant's Witness, John P. Edmondson, Cross

Mr. Owens was a member of the firm of your general counsel; is that right? A. I don't know whether he was a member of the firm or not, [178] he was the tax attorney for them.

Q. Mr. Owens in this affidavit, in his affidavit, states of his own knowledge "That National Theatres had not had since June 10, 1937, down to the date of the affidavit, an office or place of business at 444 West 56th Street, or anywhere else within the Southern District of New York."

Did Mr. Owens take that statement up with you before making the affidavit? A. I don't recall him taking the statement up with me.

That is the position that we were trying to maintain, and that is what we were trying to do, and as I say, there was the whole background; it had to do with the tax situation. Now, whether or not we were successful, I think that is something that the Court should determine.

Mr. Kostelanetz: I move to strike the balance of the witness' sentence—

The Court: The last sentence may be stricken.

By Mr. Kostelanetz:

Q. Now, just so there isn't the slightest misunderstanding, Mr. Edmondson, before you signed that affidavit you noted that there was a caption on top, a box saying "In the District Court of the United States," and the name of the parties, and you knew that the affidavit was going to be filed in connection with an antitrust action? [179] A. Mr. Kostelanetz, I read every word of it or I wouldn't have signed it.

Q. Of course.

Now, did you know, sir, that Mr. Cox, he was a fellow official of National Theatres Corporation—is that right? A. Yes, sir.

Defendant's Witness, John P. Edmondson, Cross

Q. Did you know that Mr. Cox submitted an affidavit in support of your affidavit of March 13, 1941, and the affidavit of Mr. Owens sworn to July 9, 1941? A. No, sir, I didn't.

Q. Could I possibly show you this and refresh your recollection? It is part of Exhibit 5. [180] A. Yes, sir, I have read it.

Q. My question is, and I will repeat, did you know that Mr. Cox gave such an affidavit in support of that affidavit, now that you have seen it? A. Now that I have seen it, yes, sir. And I recognize his signature. The date of that affidavit was July, 1941.

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Q. I think we were last talking about your knowledge of the use of that affidavit, sir, and if you like I will show you the paper again.

Is it correct that your affidavit was to be used for an *ex parte* order to show cause upon the grounds that the Southern District was without jurisdiction of National Theatres, and that the Court is without proper venue in such action as to National Theatres, and that accordingly the process was null, void, and without legal effect? A. Yes, sir.

Q. And you knew that? A. Yes.

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[181] Q. Was it then called to your attention in July of 1941, that the late Judge Murray Hulbert wrote an opinion, part of Exhibit 5, that the moving defendant, yourself, your National Theatres, claimed that it has never procured a license authorizing it to do business in the State of New York; has no office or place of business at 444 West 56th Street, aforesaid, [182] or at any other place within the jurisdiction of this Court; and that it has not at any time transacted or carried on any business therein. That the office at 444 West 56th Street is maintained by

Defendant's Witness, John P. Edmondson, Cross

Twentieth Century Fox Film Corporation, another defendant, of which you are an assistant secretary.

Was that brought to your attention? A. I don't recall that, sir.

Q. Was it brought to your attention that on the basis of your affidavit Judge Hulbert ordered a reference, and wrote an opinion in relation to the order stating the position of the company? A. No, sir.

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Q. To your knowledge, sir, did either Judge Clancy, in signing the show cause order, or Judge Hulbert, were they ever informed that there was some tax situation that you were making an affidavit about?

Mr. Pride: Same objection.

The Court: No. I will overrule that objection. [183] The witness can say whether he knows.

A. No, sir, I do not.

Q. Do you know, sir, whether the adversary in the Hillside case was so informed, that these papers only had to do with a tax situation? A. No, sir.

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Q. Now, in relation to New York State, sir, and for your information we have a subpoena *duces tecum* covering these items, did National Theatres during the time that you were with them pay any local New York City excise tax, sales tax, use and occupancy tax? A. I have no knowledge that they did, but the man that paid it is in this courtroom and can be subpoenaed to answer that. I certainly have no knowledge of that.

Mr. Kostelanetz: Or the documents, or tax bills for these years, up to the time this gentlemen left, here?

Mr. Pride: We have no tax bills for sales taxes.

Mr. Kostelanetz: Or occupancy tax, or any New York City local taxes. I take it by that to mean you didn't pay any.

Mr. Pride: As far as I know the company didn't pay any.

[184] Q. Did you pay any such taxes, and you, meaning National Theatres, in the State of California, up to the time you left? A. I have no knowledge that they paid anything in California in the way of taxes.

Mr. Kostelanetz: Again may I have the same concession from you up to the time he left? We have issued a subpoena *duces tecum.*

Mr. Young: We don't have them.

Mr. Kostelanetz: I take it then there are no taxes paid.

Mr. Pride: I mean by that we found no evidence of any taxes paid in the State of California of a local nature.

The Court: By the defendant.

Mr. Pride: By the defendant, your Honor. Oh, of course, that is what I meant. That was all the subpoena covered. The operating theatres of course all paid California taxes, yes, surely.

* * * * * * *

[185] Q. Is it a fact, sir, that National Theatres maintained offices at 444 West 56th Street from 1930 to date? Is that a fact, sir, or to 1952? A. National Theatres was just one of many companies that were up there in this whole orbit of things. Their minute books were kept there—

Q. I am sorry, sir, but I am talking about the offices, sir. A. They had no office there that I know of. They didn't pay any rent. They didn't own the building. That came under Twentieth Century Fox. In fact they didn't

maintain telephone facilities. I think they didn't even have any stationery, as far as I was able to figure out.

Q. Now, staying, sir, with the Hillside case, is it correct that subsequently National Theatres Corporation in an answer filed in the United States District Court for the Southern District of New York set up a defense that the Court is without jurisdiction of National Theatres; that the Court is without proper venue as to National Theatres; is not an inhabitant within the territorial jurisdiction of the Southern District; not found; and does not transact any business within [186] said district. Is that correct, sir? A. I don't know what papers you are reading from, Mr. Kostelanetz. And I was not the chief architect of the defense. I was not the attorney. If that is what the papers say it is correct; I don't know.

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[188] Q. Is it correct that the so-called tax problem which you had consisted of avoiding the jurisdiction of local taxing authorities?

Mr. Pride: I object to the form of the question.

The Court: No, that is all right.

A. Yes, sir.

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[193] Q. Now, just to keep the record straight, was there also a National Theatres Corporation, a New York corporation which had an office at 444 West 56th Street? A. I don't recall specifically, Mr. Kostelanetz. I am under the impression that some company was formed that was qualified here, or formed in New York City simply for the purpose of protecting the name. I could be wrong about that, but that is my general impression.

Defendant's Witness, John P. Edmondson, Cross

Mr. Kostelanetz: Just again to protect the record [194] entirely, I don't want to refer to minutes, but we want to know is it a fact there was such a corporation in existence at this period?

Mr. Pride: I believe such a corporation was organized but did no business, and was solely, as the witness said, to protect the name National Theatres in New York.

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Re-direct Examination by Mr. Pride:

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Q. Mr. Edmondson, just two or three questions: At the time you executed this affidavit in the Hillside case in 1941, was National Theatres Agency Corporation functioning in New York? A. Yes, sir.

Q. And where was its office? A. At 444 West 56th Street, [195] New York City.

* * * * * * *

[196] Q. Did National Agency Corporation perform the services specified in that agreement, Mr. Edmondson?

Mr. Kostelanetz: Your Honor, that keeps calling for a lot of conclusions, a lot of construction by the witness.

The Court: I think that question could be improved; however, I will overrule your objection.

A. Yes, sir, National Agency at the time in 1941, and I believe the way you asked the question, performed general services described in this contract, namely, we did all the housekeeping chores for National, made recommendations for financial policy and other things that affected their investments in the various subsidiary companies.

Mr. Kostelanetz: Your Honor, I respectfully move to strike out the answer, particularly from "housekeeping chores" on.

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Defendant's Witness, Spyros P. Skouras, Direct

[197] Q. Were services performed under this agreement prior to 1941? A. Yes, sir.

Q. For how long prior thereto? A. Starting in 1935, the Agency Corporation was formed and it was qualified to do business in New York in 1936, and those services were performed continuously from that period [198] right on up to the 1941 date that you referred to.

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Re-cross Examination by Mr. Kostelanetz:

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Q. Then without the exhibit, isn't it correct, that National Agency Corporation performed its services for subsidiary corporations, subsidiary service corporations and subsidiary operating corporations? A. That contract is between two parties, National Theatres and National Agency Corporation, but the services were [199] rendered to the parent that owned all the subsidiaries, under that contract.

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[200] SPYROS P. SKOURAS, called as a witness, having been first duly sworn, testified as follows:

Direct Examination by Mr. Pride:

Q. Mr. Skouras, where do you reside? A. 2 Shore Road, Mamaroneck, New York.

Q. And what is your present occupation, sir? A. President of the Twentieth Century-Fox Film Corporation.

Q. Do you have at the present time any employment with the defendant in this case, National Theatres Corporation? A. No.

Defendant's Witness, Spyros P. Skouras, Direct

Q. Or are you engaged by it or associated with it in any way? A. No.

Q. Mr. Skouras, were you at one time employed by National Theatres Corporation? A. Yes.

Q. When did you enter into its employment? A. In 1932. At that time it was WESCO, which was the same company which changed to National Theatres.

Q. And do I understand that your answer is that you entered into its employment in 1932? A. Yes.

Q. Were you elected an officer of the company at that time? [201] A. At that time, I was president of WESCO.

Q. Now, at that time, Mr. Skouras, what was the nature of the business of this company which was WESCO then and became National Theatres?

Mr. Kostelanetz: Your Honor, I object to that question as calling for a conclusion.

The Court: How are we going to find out whether this defendant had a place of business or was found in California unless these questions are allowed?

I will overrule your objection and to any series of objections that you may put along those lines.

A. In the exhibition of motion picture theatres.

Q. You mean in the business of exhibiting motion pictures through theatres; is that right, Mr. Skouras? A. Through theatres, yes.

Q. Now, by whom was the stock of the company owned at that time? A. By Fox Film Corporation.

Q. Did the company, WESCO, that is, have certain subsidiaries at that time? A. Yes.

Q. And did they in turn, these subsidiaries, have interests in motion picture theatres? A. Practically all of them, they had interests in motion picture theatres.

[202] Q. And were these subsidiaries of WESCO wholly-owned subsidiaries, Mr. Skouras? A. No, sir, some, and some they were not.

Q. Now, directing your attention to the State of California, was WESCO interested in theatres in the State of California in 1932 when you came with the company?

Mr. Kostelanetz: If your Honor please, may I respectfully object? Counsel is sliding over stock ownership in companies and interests in theatres, and it is a question that calls for a conclusion from the witness, your Honor.

The Court: Overruled.

Mr. Pride: Do you recall the question, Mr. Skouras?

The Court: Read the question.

(Previous question read.)

A. Yes, sir.

Q. And you recall, Mr. Skouras, how many theatres there were in California, approximately, at that time? A. About one hundred, less or more.

Q. In California? A. In California, yes.

Q. Mr. Skouras, at the time you were employed by WESCO, the defendant here, did you enter into an employment contract with that company? A. Yes.

Q. Mr. Skouras, I show you a paper purporting to be an [203] agreement between WESCO Corporation and yourself, and Charles Skouras and George Skouras, dated January 19, 1932, and I ask you if that is the agreement to which you have referred? A. Yes, sir.

Mr. Pride: I offer the agreement in evidence.

Mr. Kostelanetz: May I see it, please.

Your Honor, I have a copy which looks different, but subject to correction, it is on different paper, your Honor, but subject to correction I have no objection.

(Document referred to received in evidence as Defendant's Exhibit F, as of this date.)

[204] Q. Mr. Skouras, I direct your attention to certain provisions of this agreement of January 19th as follows: That Wesco desires to procure the services of the managers in managing the entire business of Wesco and such of its subsidiaries as it controls except Hoyts Theatres, Limited, in Australia, and further—primarily, Mr. Skouras, were you and your brothers defined in that agreement as the managers? A. Yes.

Q. And calling your attention to the further provision that Wesco does hereby for itself and on behalf of the subsidiaries which it controls, and on behalf of its other subsidiaries, subject to the approval of such other subsidiaries to this agreement, to the extent required, employ Charles Skouras, Spyros Skouras and George Skouras as the managers of the business of the corporation and its subsidiaries, and the managers accept such employment.

And the further provision, so far as permitted by law the managers shall have full authority to direct, manage and operate all of the business and affairs of Wesco except as hereinafter in this paragraph provided, pararaphs 3 and 12 provided, and as far as Wesco, during the term of this agreement, controls the business and affairs of its subsidiary companies.

Now, Mr. Skouras, having in mind those provisions of [205] that agreement, I ask you, did you and your brothers—first let me ask you, did you enter upon the performance of the duties set forth in that agreement? A. Yes, sir.

Mr. Kostelanetz: I object, if your Honor please.

The Court: Overruled.

A. But let me qualify it, Mr. Pride—while the contract was entered between Wesco and the three Skouras brothers, Charley and myself agreed to devote our time to the Wesco exclusively, and George was to be excused from any participation in the management of Wesco, and to devote his time to the Skouras Theatres. Skouras Theatres and Wesco had no relationship of any kind.

Also I was permitted that my offices were to be in New York, and to give some time, if necessary, to Skouras Theatres, provided the major part of my time was devoted to Wesco.

Mr. Kostelanetz: If your Honor please, I respectfully move to strike out the answer.

The Court: Motion denied.

Q. Mr. Skouras, was the major portion of your time devoted to the—

The Court: Don't lead.

Mr. Pride: Very well, your Honor.

[206] The Court: Do you want to ask the witness what he did? If you want to do that, you may do so.

Q. Mr. Skouras, you have said that you and your brother Charles were to act under this contract for the Wesco Corporation, and I think your brother George was excused under that, is that correct? A. Correct, sir.

Q. So I will ask no further questions about George.

Now, as to your brother Charles, what did he do under the provisions of the contract?

Mr. Kostelanetz: Same objection, your Honor.

The Court: How am I going to determine what was done unless questions like this are put to the witness and answered?

Mr. Kostelanetz: May I answer your statement, your Honor?

The Court: No. I overrule the objection.

A. It was a peculiar arrangement—

The Court: No. Just what was done.

A. (Continuing) We were managers, both Charley and myself, equal capacity. Charley's headquarters was in Los Angeles and mine in New York, but we functioned from both places to the interests of Wesco.

Q. Did your brother Charles move to Los Angeles? [207] A. Yes, sir.

Q. When did he do that, Mr. Skouras? A. Within a few weeks after the contract was signed.

Q. In other words, in 1932? A. Yes, sir.

Q. How long did he reside in Los Angeles thereafter? A. All his life after that.

Q. Now, Mr. Skouras, when you entered upon your employment under this contract where did you have your office? A. New York.

Q. Where, sir? A. 444 West 56th Street.

Q. At that time or shortly thereafter did you have any personnel working for you at that same address?

Mr. Kostelanetz: If your Honor please, I respectfully object to the form of the question "working for you," your Honor.

The Court: Overruled.

A. We had a very substantial staff.

Q. Which had its office at 444 West 56th Street? A. All of them, yes.

Q. Mr. Skouras, at that time in the year 1932 did Wesco have any other office, that is, any office other than the one you had at 444 West 56th Street? This is in 1932? A. In the East?

[208] Q. I am talking about New York, yes. A. No.

Q. Did your brother Charles have an office? A. In Los Angeles.

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The Court: Where did your brother have his office?

The Witness: At the offices in Los Angeles, on Washington and Vermont Streets. The main offices of the company.

Q. And for how long did your brother have his office there? A. All throughout his life.

Q. And that would be? A. From 1932 until he passed away.

Q. In 1954? A. Yes.

Q. Mr. Skouras, now directing your attention solely to [209] the period from 1932 through the year 1934, were you the president of Wesco throughout those years? A. Yes, sir.

Q. And where did you have your offices through those years? A. New York, 444 West 56th Street.

Q. Now, did you know the other officers of the Wesco Corporation? Did you know them? A. Yes.

Q. Where did they have their offices? A. On Washington and Vermont Streets in Los Angeles—

Q. No. I meant, Mr. Skouras, the other officers of Wesco Corporation in New York, where did those officers have their offices? A. They were all together with me in the same premises.

Q. That is in 56th Street? A. 444 West 56th Street.

Q. Now, in or about the end of 1934 was there a change in the position which you had with the Wesco Corporation? A. Yes, sir. The company was reorganized.

Q. Yes, sir. A. And the stockholders' interests changed. Fox, instead of owning 100 per cent was reduced down to forty-two per cent, and the Chase National Bank for the indebtedness of something like eighteen or twenty million dollars, they received fifty-eight [210] per cent of the new company stock.

Q. You say the "new company"? A. The National Theatres Corporation.

Q. There was no new company? A. They changed the name.

Defendant's Witness, Spyros P. Skouras, Direct

Q. And at that time who was elected president of the company? A. The president was Mr. Sidney R. Kent, who was president of the Fox Film Corporation, and I was elected executive vice president.

Q. You say you were elected executive vice president? A. Yes.

Q. Where did Mr. Kent have his office? A. 444 West 56th Street.

Q. How long did he serve as president of Wesco? A. Also the remainder of his life, up to 1942, when he passed away.

Q. In that period did he continuously maintain his offices at 444 West 56th Street? A. Yes.

Q. Now, when you became executive vice president of the company, Mr. Skouras, in or about the end of 1934 was there any change in your duties as an officer of Wesco? A. Practically none with the exception, in the Board meeting, Mr. Kent acted as the president. That is the only difference.

[211] Q. But in the performance of your work for the Wesco Company there was no change? A. No change, no, sir.

The Court: What about your brother?

The Witness: He had the same position, your Honor. It was equal. We were co-managers.

The Court: He remained where?

The Witness: In Los Angeles. But he used to visit in New York, and I used to visit in Los Angeles.

* * * * * * *

Q. Now, Mr. Skouras, I show you what purports to be an agreement between yourself, your brother, Charles, and George P. Skouras dated November 3, 1934, and ask you if you executed that agreement (handing)? [212] A. Yes, sir.

Mr. Pride: I offer it in evidence.

Mr. Kostelanetz: No objection.

(Agreement dated November 3, 1934, referred to was received and marked Defendant's Exhibit G in evidence.)

Q. Did that agreement, Mr. Skouras, terminate the agreement of 1932? A. Yes, sir.

Q. Did you thereafter enter into another written employment contract with National Theatres Corporation? A. Yes, sir.

Q. I show you what purports to be an agreement between National Theatres Corporation and Charles P. Skouras and Spyros P. Skouras dated June 13, 1935, and I ask you if that is the agreement you entered into about the date it bears? A. Yes, Mr. Pride.

Mr. Pride: I offer it in evidence.

Mr. Kostelanetz: No objection.

(Agreement between National Theatres Corporation and Charles P. Skouras and Spyros Skouras dated June 13, 1935, referred to was received and marked Defendant's Exhibit H in evidence.)

Q. In the interim, Mr. Skouras, between this termination of your prior agreement, which termination is dated November [213] 3, 1934, and the execution of this agreement dated June 13, 1935, were there negotiations leading up to the execution of this agreement? A. Yes, sir.

Q. And were they protracted? A. Yes, sir, quite long.

Q. And in that period did you continue to perform services for the corporation? A. Yes, sir.

Q. And act as executive vice president? A. Yes, sir.

Q. And in that period did you perform roughly the same services that you had theretofore performed? A. Yes, sir.

Q. Now, Mr. Skouras, I direct your attention to several short provisions of this agreement between National

Theatres Corporation and your brother Charles P. Skouras and yourself dated June 13, 1935, to the following effect:

"WHEREAS, the Managers have heretofore managed the theatres and/or theatrical enterprises (and certain business and affairs incidental thereto) owned or controlled or operated by the Corporation and/or its past or present subsidiaries in the territory covered by this Agreement; and * * *"

"The Managers, subject to the provisions hereinafter set forth, shall supervise the management of such [214] theatres and theatrical enterprises owned, controlled or operated by the Corporation in the territory covered by this Agreement, and have such official or executive duties in connection with any other business and affairs of the Corporation in said territory, as the Board of Directors of the Corporation may at any time or from time to time in its discretion determine; and shall supervise the management of such theatres and theatrical enterprises owned, controlled or operated in said territory by subsidiaries of the Corporation which shall accept the services of the Managers under contracts or arrangements satisfactory to the Corporation in its discretion, and have such official and executive duties in connection with any other business and affairs of such subsidiaries in said territory, as the respective Boards of Directors thereof may at any time or from time to time in their discretion determine."

I ask you, Mr. Skouras, having those provisions in mind, did you enter upon the performance of the services provided for in that agreement? A. Yes, sir.

Mr. Kostelanetz: I object to it. I object to the form of the question. It is calling for a conclusory answer, your Honor.

[215] The Court: Don't you think he might be able to conclude from what he did whether he entered upon the performance of the duties stated in the contract?

I will overrule the objection.

Q. Did your brother Charles similarly enter upon the services performed under that agreement?

Mr. Kostelanetz: Same objection.

The Court: Objection overruled.

A. Yes, sir.

Q. Where did he perform the services? A. In Los Angeles.

Q. As a matter of fact, Mr. Skouras, was there any provision made in this 1935 employment contract as to where you or your brother, or both of you, should reside? A. I am under the impression that it was provided that I was to reside in New York, and my brother in Los Angeles.

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[216] Q. What services, Mr. Skouras, did you perform for National in the years between 1932 through 1934 in New York?

Mr. Kostelanetz: If your Honor please, may I have my objection to the question on the ground it calls for a conclusion.

The Court: If you want to avoid interrupting this examination why don't you take advantage of what I have said. You can have a standing objection. Your objections are overruled in their entirety as to anything which pursues the line of inquiry that has been instituted.

A. All the film contracts for Wesco and its subsidiaries, they were negotiated in New York. Many financial ar-

rangements were negotiated here and also many undertakings that were negotiated, as well as the Board of Directors of Wesco; that was in New York, and all the acts of all of the subsidiaries had to be approved by the Board of Directors.

Mr. Kostelanetz: I take it, your Honor, that your ruling applies to a motion to strike.

The Court: Yes.

Mr. Kostelanetz: There has been considerable summary given here, your Honor.

Q. You mentioned, Mr. Skouras, meetings of the Board of Directors in the period that I am referring to, that is [217] through 1934; where were the Board meetings of the company held? A. In New York City at 444 West 56th Street.

Q. In this period, Mr. Skouras, did the company, the Wesco Corporation, maintain a bank account? A. Yes, sir.

Q. Where was the bank account maintained? A. Well, everywhere that we were operating theatres, and we had our main account in New York City.

Q. Wesco had its main account in New York? Is that your testimony? A. It is my impression we had an account in New York.

Q. Where was that, sir? A. I believe the Chase National Bank.

Q. You testified that you performed certain services in connection with the financial transactions in New York. Now, I ask you did you have any negotiations with any banks or financial institutions concerning loans in that period of time? A. Yes, sir.

Q. Did you have any negotiations with respect to arranging for loans to subsidiary companies? A. To some of the principal subsidiary companies.

Defendant's Witness, Spyros P. Skouras, Direct

Q. Did you have any negotiations regarding guarantees [218] by Wesco of these loans made to subsidiary companies? A. I don't remember exactly if we had such guarantees.

Q. I show you, Mr. Skouras, for this purpose, what purports to be a promissory note dated June 25, 1932, the Pasadena Theatre Corporation to the Chase National Bank, attached to which is the endorsement and the guarantee of payment, and I ask you if you executed that guarantee of payment on behalf of Wesco Corporation? A. My signature is on it. There is no question, yes, sir.

Mr. Pride: I ask that that exhibit be marked in evidence.

Mr. Kostelanetz: If your Honor please, the same objection I had before.

The Court: I overrule the objection.

(Promissory note referred to was received and marked Defendant's Exhibit I in evidence.)

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[220] Q. What did Wesco do in those transactions that you have described? A. Hypothecated its assets to the bank in order for us to borrow money.

Q. Mr. Skouras, there has been testimony here that in or about the end of 1934, or the first part of 1935, National opened certain offices in Jersey City. Are you familiar with that? A. Yes, sir.

Q. What was done in that connection? A. When the Chase Bank became the controlling factor, the lawyers insisted, for franchise state tax purposes, to move to Jersey. I objected strongly because it would handicap the functions of our principal part of our business with the film companies, and with other factors in general, but we moved the [221] accounting department, which was a skeleton, to advise me and the Board of Directors of the operations of the corporation, into Jersey. But I kept my office in New York. And I stayed in New York.

Defendant's Witness, Spyros P. Skouras, Direct

Q. Did you have an office in Jersey City? Did you have an office in the Jersey City area? A. No, sir.

Q. And Mr. Kent, the president at that time, did he have an office there? A. No, sir.

Q. Now, with respect to these people who you said were in the accounting department or bookkeeping department, who had offices in Jersey City, did you confer with them from time to time? A. Yes. They had to come to the New York office to bring us information, since dealing in film contracts, it was required to substantiate some statements as to the grosses of the theatres, and as to the expenses in general, and it was necessary to have continuous information. And I had been insisting that this system that was established by Julian Hagen, the lawyer of the bank, to be abandoned, because the saving of the franchise tax was inconsequential in the face of handicapping the operations.

Q. How long were these offices maintained over in Jersey [222] City? A. In my opinion, I don't remember exactly, about a year and a half or two years.

Q. And what happened then? A. Then we brought the offices back to New York. All the people that we sent to Jersey, we brought them back, and we compromised with Mr. Hagen to have a little room there to have the Board of Directors meetings. And afterwards we abandoned this room. We held our meetings at State Theatre of New Jersey, at the manager's office.

Q. As I understand it, Mr. Skouras, you said that for about eighteen months to two years you had employees over there in those Jersey City offices, and then you brought them back to New York, and then do I understand you to say that a room was used by the company for the Board of Director meetings? A. And that was abandoned. We used that for a while. We used for a while the theatre manager of the State Theatre in Jersey—

Q. Do you mean you used the office of the manager of

the State Theatre in Jersey? A. Yes. And then eventually we abandoned even those meetings.

Q. Apart from this room that you said was used for Board meetings in the State Theatre Building, did you have any office [223] in the State of New Jersey? A. No, sir. When we brought our people back to New York, no, sir.

Q. Are you familiar with the company known as the National Agency Corporation? A. Yes, sir.

Q. When was that organized, sir? A. Simultaneously at the time when we changed the name from the Fox Wesco to the National Theatres. Practically.

Q. Do you mean when you changed from the name of Wesco to National Theatres? A. We also at about that time—I don't remember the exact date—but we also organized the National Theatres Amusement Corporation—the Agency Corporation.

Q. The Agency Corporation?

Mr. Kostelanetz: Will you fix the date?

Mr. Pride: Yes. I am going to.

Q. Mr. Skouras, there has been testimony here that that corporation was organized in September, 1935. Would you say that is approximately the date of its organization? A. According to the record.

Q. Now, did you become an officer of this National Agency Corporation? A. I believe I was the president. [224] Q. And what was the purpose of the organization of this National Agency Corporation, Mr. Skouras? What functions was it to perform? A. Well, as a service corporation.

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[226] The Court: Subsequent to the execution of this Plaintiffs' Exhibit 19, what services, if any, did the National Agency render to the National Theatres?

Isn't that what you want?

Mr. Pride: Thank you, sir.

The Witness: My best recollection, your Honor, anything pertaining to inconsequential matters for the corporation, things for the corporation without the necessity of approval of the Board of Directors of the National organization.

The Court: What did they do?

The Witness: For instance, we bought supplies, there were insurance conferences held until the subjects reached were sufficient to present to the Board; we tried to enter contracts with some film companies, although some film companies accepted it, but the [227] majority didn't want to accept it, they wanted the main company to sign.

In general, it was a legal instrument which was created in order to render services to the company. It was collecting also film rights, fees from the different corporations in order to pay some of the expenses of the service organization.

The Court: What, if anything, did that National Agency do in California?

The Witness: It did practically the same thing it was doing in New York.

By Mr. Pride:

Q. Mr. Skouras, this National Agency Corporation held meetings of its Board of Directors; did it not? A. Yes, it did.

Q. I think there has been testimony here that those meetings of this Agency Corporation were generally held about once a week; is that your recollection? A. I think every once a week, either Wednesday or Thursday, yes.

* * * * * * *

[229] Q. Did the Agency Corporation have offices, Mr. Skouras? A. Yes.

Q. Where? A. The same offices, the National Theatres, 444 West 56th Street.

Q. And did it have employees working there? A. Yes.

Q. Is that true from the period that it commenced operations down through 1942? A. Yes.

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[230] Q. Mr. Skouras, as to the functioning of this Agency Corporation, was it designed to operate on a profit basis? A. No, sir.

Mr. Kostelanetz: If your Honor please, I take it—

The Court: I will overrule the objection.

Mr. Kostelanetz: May I have objection to this line, your Honor, without repeating?

[231] By Mr. Pride:

Q. Did it have on its pay roll various employees? A. Yes, sir.

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Q. • • • Now, on this Agency Corporation pay roll, were there people who were working for you in the film-buying field? A. Yes, sir.

Q. And did the corporation have accountants and bookkeepers on the pay roll?

Mr. Kostelanetz: This is the Agency?

Mr. Pride: Yes, the Agency.

A. It had the same premises as the National, it was the same people, it was actually the same people, it was not even different people?

Mr. Kostelanetz: If your Honor pleases, I must object.

The Court: If there were a jury present, then rulings on questions put by counsel would be much more rigid and counsel would be held to the tech-

nical canons [232] of evidence. But, there isn't any jury present, and you have a free opportunity in cross examination to go into these things that you think are suggested by the questions of counsel.

Now, you have a general objection; can't you rest on that?

I will overrule your objection.

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[234] Q. What did you do in your work for National and National Agency Corporation in California? A. Practically the same function as in New York, with this exception: In California we were concerned with the actual theatre operations. We had meetings and we set the policies how the theatres were to be operated. We tried from time to time to participate in California with the operations. The direct operation of New York was as the buyer of the product and finances and the balance as I said.

Mr. Kostelanetz: Your Honor, I am sorry to interrupt the Court, but was it in line with your Honor's previous statement that my objections covered this type of questions and answers?

The Court: Yes.

Mr. Kostelanetz: Thank you.

Q. In the period between 1932-1938, Mr. Skouras, did you make trips to California? A. Yes, sir.

Q. Can you tell us how many? A. Oh, we averaged between six to eight a year.

Q. Now, what duration would they be? A. Sometimes from one week to three weeks, and sometimes a few days, four or five days, depending on the nature of the subject that I was visiting for.

[235] Q. Now, in these visits to California, did you confer with your brother? A. Always.

Q. Did you negotiate with representatives of any of the film producing companies? A. The negotiations, rather, the principal negotiations were in New York, but the direct negotiations per theatres was done in the field, and I would explain to the film personnel the nature of the agreement in the presence of the film representatives.

Q. Let me ask you, Mr. Skouras, on these trips to Los Angeles, were you accompanied by any other people when you went there? A. Quite often with the film buying staff, practically most of the time.

Q. But were other officers of National, would they go with you, too? A. Sometimes the lawyer of the company, sometimes the treasurer or the accountant.

Q. And Mr. Gambee? A. Mr. Gambee and the late Mr. Cox.

Q. Let me ask you, on these trips to California, did you visit or look over the theatre properties which were in or in which National was interested there? [236] A. Yes, always I would like to do it and try to visit practically the theatres that I haven't seen before, I always try to see theatres, not only our own, also the competitor's.

Q. And would be both or on all of your trips, I believe you said. A. Not always; depending upon the length of the visit.

Q. And did you engage in any conferences or negotiations with respect to new theatre acquisitions in Los Angeles? A. Yes, but that was getting—

Mr. Kostenlanetz: If your Honor pleases, can we have some date, some date fixed?

Mr. Pride: I fixed the date, I fixed the date—

Mr. Kostelanetz: 1930 to 1952?

Mr. Pride: 1930 to 1938, Mr. Kostelanetz—no, 1932 to 1938.

The Court: That was the time in the original question, yes.

Mr. Kostelanetz: I see.

I have my standing objection, your Honor?

The Court: Yes.

A. In the negotiations, they were carried on by the local people, and in the instance of Los Angeles, by my brother [237] Charlie, and sometimes I would participate, but I did not as a rule participate in the negotiations of acquisitions of leases or the disposition of theatres.

Q. In this period of time, Mr. Skouras, were there any other people performing services for National in Los Angeles? You have mentioned your brother; I ask you were there any other persons? A. Yes. Mr. Charlie Buckley, Mr. John Bertero—

Q. Who was Mr. Buckley? A. Mr. Buckley was the counsel of the corporation. Mr. Bertero was assistant to Mr. Buckley, and when Mr. Buckley was deceased, Mr. Bertero succeeded him.

Also, the head of the accounting, Mr. Collins—I have forgotten the chief accountant—and many others, the advertising department visited the studios in behalf of the company.

Q. There has been introduced in evidence here, Mr. Skouras, an agreement between the Agency Corporation and Mr. John Sullivan which was guaranteed by National Theatres Corporation: Did you know Mr. Sullivan? A. Yes, sir.

Q. Who was he? A. He was the film buyer of the West Coast Theatres, Fox West Coast Theatres.

[238] Mr. Kostelanetz: Is that Wesco Theatres?

The Witness: Fox West Coast Theatres.

Mr. Kostelanetz: Fox West Coast Theatres?

The Witness: Yes.

Defendant's Witness, Spyros P. Skouras, Direct

By Mr. Pride:

Q. Where was his headquarters? A. His headquarters was in Los Angeles, but during the buying season, from May to September, he used to come to New York to aid me with negotiations.

Q. Did Mr. Sullivan participate in film negotiations for theatres other than those operated by this company you said he was employed by? A. Very seldom for others, principally for the Fox West Coast.

Q. But his office in that regard was in Los Angeles, except when he came here to assist you? A. Correct, sir.

Q. Where did he reside? A. 444 West 56th Street in New York—I am sorry, he resided in Los Angeles.

Q. In Los Angeles? A. I beg pardon.

Q. Thank you, Mr. Skouras.

The Witness: Excuse me, your Honor.

The Court: It is all right.

[239] Q. Mr. Skouras, did you know a person by the name of Mr. Epsteen? A. Irving Epsteen, yes, sir.

Q. Did he perform work for National? A. Yes, sir, he was the head of our insurance company.

Mr. Kostelanetz: Same objection, and I take it the same ruling?

The Court: Yes.

Q. Where did he reside? A. Los Angeles.

Q. Where did he have his office? A. At the National Theatre, which was at Washington and Vermont Streets.

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Defendant's Witness, Spyros P. Skouras, Cross

[240] *Cross Examination by Mr. Kostelanetz:*

Q. Now, Mr. Skouras, within the last ten or fifteen minutes you identified Mr. Buckley and Mr. Bertero as being attorneys for the Wesco Corporation? A. Yes, sir.

Q. And I guess Mr. Albert W. Leeds falls within that classification too? A. Yes, sir.

* * * * * * *

[241] Q. So that in any event, whatever capacity it was that you had there from January to October, 1932, there did come occasions when litigation came to your attention; is that right? A. Mr. Kostelanetz, not all litigation, only very, very important instances.

Q. Now, there was a man named L. A. Woolams, a vice president of Wesco, out on the coast; is that correct? A. For a brief period of time.

Q. Now, I call your attention, sir, to the fact that [242] Mr. Woolams in October, October 8, 1932, announced in the Superior Court in the State of California and for the County of Los Angeles, in an affidavit, that "Wesco did not conduct any business in the State of California." Now, was that brought to your attention, sir?

Mr. Pride: I object to it.

Mr. Kostelanetz: "Was that brought to your attention"?

Mr. Pride: You mean the affidavit?

Mr. Kostelanetz: Yes.

A. I don't remember whether it was brought to my attention or not, sir.

Q. Was it brought to your attention that Mr. Woolams said in this affidavit that, "Wesco Corporation never had and does not have an office of any kind in the State of California." Was that brought to your attention? A. I don't remember it, Mr. Kostelanetz.

Defendant's Witness, Spyros P. Skouras, Cross

Q. Was it brought to your attention that Mr. Woolams represented that in the State of California there was not and did not have any employee or employees or management agents of Wesco Corporation; was that brought to your attention, sir? A. I don't remember this.

Q. Now, let us see if I can help your recollection, Mr. Skouras.

[243] I show you Plaintiffs' Exhibit 4 in evidence, which is a certified copy of papers filed in the Supreme Court of the State of New York, County of New York, and I ask you whether, by looking at the signature at the page opened to you, whether that is your signature? A. Yes, it is my signature.

Q. And you notice, sir, that your signature was sworn to before a notary public, I believe a lady named Clancy? A. Yes, sir, Clancy.

[244] Mr. Kostelanetz: Now, may I have the paper back.

By Mr. Kostelanetz:

Q. Sir, would it refresh your recollection at all about this action of Herberg or Jensen against Wesco if I were to tell you that in Plaintiffs' Exhibit 4 in evidence the following statement appears with regard to an action called Marjorie Palmer against Wesco Corporation, which appears to be the some action under a different name, and I read you this quotation with regard to Palmer against Wesco, appearing in your affidavit at page 4:

"It should be noted that this action was not begun until January 18, 1934, and action was previously begun in California on September 26, 1932, but was dismissed against the defendant"—that is Wesco, of course—"on the ground that defendant was not doing business in California. On December 30, 1933, almost a year later, an action was begun in Delaware, but plaintiff discontinued that action and brought the present action"—"at the beginning of 1934."

Now, does that refresh your recollection in any way concerning the California action and the plaintiff leaving California and wandering to Delaware and coming to New York?

Mr. Pride: I submit, the form of the question is [245] objectionable.

The Court: Overruled.

A. No, sir, it does not.

Q. It does not? A. I regret, it does not.

Q. Now, sir, as president of Wesco, sir, you had general counsel; is that correct? A. Yes, sir.

Q. And in the same action, sir, which is Plaintiffs' Exhibit 4, Palmer against Wesco Corporation, did you tell the Court, the Supreme Court of the State of New York, County of New York, that you didn't have knowledge or information sufficient to form a belief as to whether or not Wesco was or was not doing business in the State of New York?

Mr. Pride: I submit the form of the question is objectionable, and I also object to the question.

This document, well, your Honor permitted Mr. Kostelanetz to put into evidence, and I think the question was, did he make a statement paraphrased in terms of the paper itself, and I submit he should be asked whether he signed it and then it speaks for itself.

The Court: Overruled.

By Mr. Kostelanetz:

Q. Is that correct? A. I don't remember.

[246] Q. I mean this whole thing has faded out of your memory; is that right, sir? A. Yes, entirely.

* * * * * *

[249] Q. Is it correct that "National Theatres engaged in no other business other than holding stock in and other securities"; is that right? A. That I don't understand, I didn't understand it.

The Court: Well, what Mr. Kostelanetz is in effect asking you, Mr. Skouras, is whether the entire business of National Theatres was confined to holding stock in other companies.

The Witness: Frankly, your Honor, I can't answer yes or no.

The Court: All right.

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[250] Q. To your knowledge, sir, was there a listing of a telephone in its own name in the period of at least 1930 to 1935 in the City of New York? A. No, sir. We had through Twentieth Century Fox, through the parent company at that time, because it occupied the premises.

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[251] Q. Now, did you know that in 1941 there was presented to Judge Hulbert, a Judge of the United States District Court, an order to show cause wherein a sworn statement was made by an officer of the corporation, that the principal office of the corporation, going back to December 29, 1934, was Jersey City, New Jersey. Did you know that? A. I didn't know that, no, sir.

Q. Did you know— A. If I knew I don't remember it, Mr. Kostelanetz.

Q. Did you know as of March, 1941, or at least in an affidavit verified in March of 1941, that it was represented to Judge Clancy in procuring a show cause order, and later [252] to Judge Hulbert, that none of the officers, directors, or employees of National Theatres Corporation

maintains an office as an officer, director, or employee of National Theatres Corporation in the Southern District of New York?

Mr. Pride: I object to the form of the question, "represented to Judge Clancy."

The Court: Overruled.

A. I don't remember.

Q. Or do you know that it was represented to the judges and the Court I mentioned that none of the officers, directors or employees of National Theatres Corporation transacts any business on behalf of National Theatres Corporation in the Southern District of New York? A. I don't remember anything like that, no, sir.

Q. Now, was it reported to you, as president of this corporation, or executive vice president of it, that—

The Court: Which corporation?

Mr. Kostelanetz: National Theatres at this time, your Honor.

Q. (Continuing) —that Judge Hulbert had held on July 11, 1941, that National Theatres Corporation claims—I am sorry—the Judge stated that National Theatres Corporation claims that it has never procured a license authorizing it to do business in the State of New York, and has no office or [253] place of business at 444 West 56th Street, aforesaid, or had any other place within the jurisdiction of this Court, and that it has not at any time transacted or carried on any business therein. The office of 444 West 56th Street, aforesaid, is maintained by Twentieth Century Fox Film Corporation, another defendant, of which Mr. Edmondson is assistant secretary.

Was that ever told to you, sir, that Judge Hulbert so wrote in an opinion, that your company made that claim? A. I don't remember if I was ever told. I don't remember, sir.

Defendant's Witness, Spyros P. Skouras, Cross

Q. You would be shocked, sir? Are you shocked to hear that?

Mr. Pride: I object.

The Court: I sustain the objection. You don't have to answer that.

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[254] Q. Now, at the close of business last night, we were discussing here two lawsuits; one was a lawsuit in California which was later moved to Delaware and then moved to New York and in connection with which you gave an affidavit, sir—do you recall being shown the affidavit yesterday? A. Yes.

Q. And your testimony yesterday was that you had no recollection of that litigation; is that right? [255] A. That is correct, that is right, sir.

Q. Now, in going over your testimony, or rather in going over the facts with you, did your counsel Dwight, Harris, Koegel & Caskey refresh your recollection, did they give you any facts or papers to refresh your recollection in connection with that litigation? A. No, sir.

Q. So that you still know nothing about it except that you have seen the papers here in court? A. As far as I am concerned, that is my memory.

Q. That applies as well to the California counsel and official of the company, Mr. John Bertero, who is here in court; you haven't gone over that case either to refresh your memory? A. No, sir.

Q. I take you back, sir, I take you back, sir, to the Hillside case concerning which questions were asked of you last night, yesterday afternoon—I am sorry—and I ask you again whether it is the fact that let us say from June 10, 1937, down to 19-1, National Theatres had an office at 444 West 56th Street; is that right? A. That is right, sir.

Q. That is the fact, isn't it? A. That is correct.

Defendant's Witness, Spyros P. Skouras, Cross

Q. Do you know Mr. William W. Owens of the firm of Dwight, Harris, etc.? A. Yes, sir.

[256] Q. Now, was it called to your attention, sir, that Mr. Owens in an affidavit which is part of Exhibit 5 stated:

"I state of my own knowledge that National Theatres Corporation has not at any time since June 10, 1937, down to the date of this affidavit"—which is July 9, 1941—"had an office or place of business at 444 West 56th Street, or anywhere else within the Southern District of New York."

Now, was that called to your attention, sir? A. No, sir.

Q. Is this the first time you have heard this statement? A. The first time.

Q. Now, Mr. Skouras, as part of Exhibit 5, we have an answer, a paper entitled "Answer to Supplemental Complaint," verified by the lawyers of Dwight, Harris, and filed in the Southern District Court on April—

Mr. Young: Signed.

Mr. Kostelanetz: Signed, I am sorry.

Q. (Continuing) —signed February 23, 1945, and stating that:

"National Theatres alleges that this Court is without jurisdiction of National Theatres, that the Court is without venue as to National Theatres, that National Theatres is not an inhabitant within the [257] territorial jurisdiction of the District Court of the United States for the Southern District of New York, and may not be found within said District, and does not transact any business within said District."

That is signed by Mr. Caskey.

Now, was this called to your attention in 1945 at the time it was signed? A. I don't remember if it was called to my attention.

Defendant's Witness, Spyros P. Skouras, Cross

Q. Now, exactly the same paper in the same terms was filed April 16, 1945, and I think this is signed by—I am sorry—

This paper seems to be dated November 28, 1941, signed by the Harris firm, I think by Mr. Pride, stating exactly the same thing which I have just read to you.

Was that called to your attention sir? A. Again I don't remember if it was called to my attention.

Q. Is it your testimony now, sir, that these statements filed with the, or documents filed with the United States District Court for the Southern District of New York are just a lot of nonsense?

Mr. Pride: I object.

The Court: I sustain the objection.

By Mr. Kostelanetz:

Q. Mr. Skouras, the statements or answers in the Hillside [258] case to which I have just called your attention, is this the first time that you have ever heard these answers made? A. I don't remember if it was the first time or not, but I haven't the slightest memory.

Q. Is your recollection bad generally, sir?

Mr. Pride: I object.

The Court: Sustained.

By Mr. Kostelanetz:

Q. In going over the facts, sir, in relation to your testimony here, did you go over with your counsel the particular papers or facts referred to in the Hillside case as to National Theatres doing business in New York? A. I don't remember the Hillside case, I don't remember the Hillside case in the slightest way.

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Defendant's Witness, Spyros P. Skouras, Cross

[260] Q. Now, does National Theatres own, or during this entire period that you were connected with it, did it own a single piece of real estate? A. I am not in the position to answer yes or no.

Mr. Kostelanetz: Would counsel be good enough to produce any land papers, any papers of ownership of a fee?

I think they were covered by our subpoena *duces tecum.*

Mr. Pride: I don't recall, Mr. Kostelanetz. I submit, though, your Honor, that that request does not go to what I consider proper cross examination of this witness.

The Court: Well, I don't think it does.

[261] Mr. Kostelanetz: If your Honor please—

The Court: Although it may aid you. If you find any such instrument or instruments, the production may refresh the recollection of the witness in respect to the question which Mr. Kostelanetz is propounding.

Mr. Pride: We haven't here, your Honor, such a paper.

Q. Did National Theatres Corporation assign a single lease during this entire period in its own name? Did it take a lease in its own name where it was the tenant? I am not talking now about guaranteeing a lease but I mean being a tenant under a lease. A. I am under the impression that I can recollect of an instance, I believe the Roxy Theatre, when it was transferred from the Twentieth Century-Fox to the National Theatres, I think that was signed by the National Theatres, but I cannot be sure about it. My memory is very foggy in that instance.

Mr. Pride: That was long after the institution of this case.

Q. Could you fix the date of that, sir? A. What?

Q. As to whatever recollection you have of the Roxy Theatre, the possibility or the impression. [262] A. It was at the time when it was transferred. It was about either 1951 or 1952. It was about 1952, I think.

Q. Now, outside of the Roxy Theatre around 1951 or 1952, as you believe, is there a single lease, sir, which National Theatres signed as tenant? A. As far as my memory serves me, I cannot say yes or no.

Mr. Kostelanetz: If your Honor please, I respectfully ask the defendant to produce the subpoenaed material under item 14 of the subpoena *duces tecum*, any and all leases or deeds, wherein National Theatre will be the tenant, landlord, grantee, grantor, relating to property within the State of New York and the State of California in effect at any time during the period of January 1, 1930, to the date of the filing of the complaint herein.

Mr. Pride: We have found no items which are called for in item 14 of that subpoena, and therefore as far as the company is presently concerned there are none.

Q. Sir, what is a licensing agreement for the exhibition of moving pictures? Will you give us a short definition, sir, for the record? A. The theatre buys films from a film company.

Q. And that is covered by a paper, is that right, called a licensing agreement? [263] A. Yes, a contract.

Q. Did the National Theatres Corporation, sir, ever sign a licensing agreement of any kind for the exhibition of motion pictures? A. Yes, sir.

Q. National Theatres itself? A. National Theatres together also with the Amusement—National Theatres Amusement Agency. Many instances. Many film com-

panies insisted that the National Theatres were to sign. One particular instance I remember was the MGM. I am under that impression.

Mr. Kostelanetz: Now, could counsel be good enough to produce any licensing agreements signed by National Theatres?

If this will take any time, I will go on to something else.

Mr. Pride: We have certain samples of these film license which you requested. I am looking for one that is signed by Mr. Skouras. Can you go ahead in the meantime?

The Court: Produce one signed by Mr. Skouras if it is the defendant's licensing agreement.

Mr. Pride: No, the ones that we have, your Honor, [264] here—I was particularly looking for one that was signed by him—are not executed in the name of the defendant but in the name of one of these agency corporations as to which there has been testimony.

Mr. Kostelanetz: My request, your Honor, was for those signed by National Theatres, the defendant in this case.

Of course, the Agency, or any of the other corporations, had lots and lots of licensing agreements.

Mr. Pride: You are limiting your request, Mr. Kostelanetz, to a document signed by National Theatres Corporation?

Mr. Kostelanetz: Yes.

Mr. Pride: And as far as our search has developed there is no film licensing agreement in the name of that corporation, although Mr. Skouras, the president of the company, has signed this agreement, for example, over the name of Fox West Coast Agency Corporation.

Mr. Kostelanetz: If your Honor please, we are obviously talking about two different things. There are no National Theatre agreements wherein they are the principal party named and signing the licensing agreement.

Mr. Pride: Yes, none that we have found or have [265] here now.

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[266] Q. Now, let me ask you this direct question. You have a corporation called National Agency, and then renamed National Amusement Corporation, and you were head of that, too, isn't that correct? A. Yes.

Q. Now, that corporation was the one that was identified here in various contracts, and they in 1935 received the right to all your services. That places the corporation, sir? A. Yes.

Q. Now, sir, did that corporation in its own name sign any licensing agreements for the exhibition of motion pictures in theatres? [267] A. Yes. But let me qualify it, Mr. Kostelanetz.

Actually, the Agency, as far as I was concerned, dealt with people that expect them to have confidence in me—was the National Theatres. This was an instrumentality of service.

But actually in our negotiating with people they placed their products in our hands, and it was not in this empty shell that was described yesterday, but actually was an instrument that was doing for the National Theatres, and in no way—

The Court: Mr. Skouras, if I may interrupt you, the only point this question calls for is whether the Agency, National Agency or the National Amusement Company entered into a licensing agreement.

The Witness: Yes, sir.

Defendant's Witness, Spyros P. Skouras, Cross

Q. In their own name, sir? A. In their own name.

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[269] Q. Is it correct, sir, that the only—well, the subsidiaries of National Agency, later called National Amusement, or National Theatres Amusement Corporation, only the subsidiaries signed licensing agreements, National Agency or National Amusement never signed licensing agreements? A. This I don't remember. I am under the impression, as I said before, that the instrumentality was of no importance, everything was in the end for the responsibility of National Theatres.

Q. When you say "the instrumentality," sir, the instrumentalities were of no importance, was it brought to your attention in 1941, in an affidavit before Judge Hulbert that Mr. Cox, who was then the treasurer of National Corporation, said that, "National Theatres Corporation had never entered into any licensing agreement for motion pictures either within the Southern District of New York or at any other place"? A. That Mr. Cox never traded, they trusted their merchandise to me, and as far as I was concerned I was guaranteeing [270] personally to every one of them that this was an instrumentality of service, that the National Theatres was responsible. Mr. Cox never negotiated one single film deal.

Mr. Kostelanetz: Could counsel please produce the guarantee to which Mr. Skouras referred?

The Witness: I did personally, I represented to the film companies that the Agency represented an honest organization, that the National Theatres will honor it.

The Court: Was that a representation of yours or a guarantee, was it in writing or just oral?

The Witness: Oral, your Honor.

The Court: Oral.

The Witness: Yes.

I dealt, if your Honor will permit me, I dealt--off the record--if you will, please, I dealt with these people over a period of years.

The Court: I understand.

The Witness: It was a case of believing me, what I was saying.

* * * * * * *

[272] Q * * *

Now, from the time that National Agency or National Theatres Amusement Corporation was created, is it correct that you received your salary check from that corporation? A. Yes, sir.

Q. And then when you became president of Twentieth Century-Fox Film Corporation, that was what, 1942, 1943? A. 1942.

Q. 1942, you still remained an official of the defendant in this case; is that right? A. I was. I resigned as executive vice-president and I was president of the Amusement Corporation, and I became Chairman of the Board of both corporations.

Q. And that continued right up until the time of divorcement; is that right? A. Yes, sir.

Q. And that, so far as your company was concerned, went through in what year, sir? A. I believe in 1950 or 1951.

Q. Or 1952? A. 1952, about 1952, I think.

Q. Now, you know, do you not, that there is in evidence here Plaintiffs' Exhibit 20, which is the assignment labeled "Assignment of Skouras Contract of December 2, 1935," a [273] paper executed between National Theatres Corporation and National Agency Corporation; you are aware of the existence of that assignment? A. The date, Mr. Kostelanetz?

Q. December 2, 1935. A. Yes.

Defendant's Witness, Spyros P. Skouras, Cross

Q. Now, the assignment concerns the work of folk called managers, and the managers, and the managers were you and your brothers; is that right? A. Yes.

Q. Now, National Theatres, and was this called to your attention, National Theatres said to National Agency: "The managers rendering services to or through you shall act not as our agents, but solely as your agents and employees, and in such official or executive capacity as your Board of Directors shall determine."

Now, was that called to your attention that since National assigned all the rights they had to your services you were to act for Agency as its agent rather than as agent for National? A. Mr. Kostelanetz, yesterday I was very clear and I said we held the National Theatres responsible to carry on our contract.

Q. Mr. Skouras, thank you for the comment. A. I say yes, you are right, that is the record.

Q. This was called to your attention? A. Naturally.

* * * * * * *

[278] Q. Fox West Coast Theatres Corporation, however, owned the stocks of many, many, many other corporations which owned theatres? A. All the corporations, either wholly-owned or partially-owned.

Q. Did you at the same time or shortly thereafter that you became president of National Theatres, did you become president of Fox West Coast Theatres and all the subsidiary companies? A. I am under the impression, and I am quite sure about it, that all the local corporations, the local manager was the president. In the instance of my brother Charlie who happened to be co-manager not only for California, but also in the entire system, he was the president practically of all of the subsidiaries. We tried to decentralize and localize our operations, and we eliminated the system that I [279] believe was in existence when we were engaged of having too many officers from New York. We tried to give a local atmosphere to each corporation.

Defendant's Witness, Spyros P. Skouras, Cross

Q. But your brother Charles did become president, I think my last information is, of some 240 corporations; is that right? A. That is my recollection.

Q. And were you a director of all of these corporations? A. In some principal ones, I was the chairman of the board.

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[285] Q. It is correct, Mr. Skouras, that Fox West Coast Theatres Corporation was a 100 per cent subsidiary? A. To Twentieth Century Fox?

Q. No. I said it was a 100 per cent owned subsidiary. It was a 100 per cent owned subsidiary of National Theatres Corporation? [286] A. The National Theatres Corporation?

Q. Yes. I am sure you didn't hear me. I am sorry.

Isn't it a fact that Fox West Coast Theatres Corporation was a 100 per cent owned subsidiary of National Theatres? A. Yes.

Q. Isn't it correct that Fox West Coast Agency Corporation was a 100 per cent owned subsidiary of National Theatres? A. I believe so, yes.

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[288] Q. How about Mr. Cox? When did he come with the National Theatres Corporation? A. Mr. Cox came with the Wesco during the period when many of the subsidiaries were in bankruptcy, and then he joined with the National Theatres when it was organized after the reorganization.

Q. Well, roughly what years are we talking about, Mr. Skouras? A. I think Cox—I am under the impression he came in 1933.

Q. And stayed until? A. He died.

Q. That was when, sir, roughly? A. Two years ago.

Q. And his activity remained the same throughout the entire period so far as National Theatres was concerned, as far as you know? A. Yes, sir.

Defendant's Witness, Spyros P. Skouras, Cross

Q. And his work was mainly what? A. Treasurer. He became treasurer at the reorganization of the corporation. Before that he was acting as counselor. He was accountant counselor.

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[290] Mr. Kostelanetz: I said from 1932 up until the time—I should have said divestiture rather than divorcement—where the activities of National Theatres and National Theatres Amusement Company, as I understood his direct testimony, were approximately the same in the State of New York and the State of California.

The Witness: That is correct.

Q. That is correct, isn't it? A. Yes.

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[293] Q. Now, you testified, sir, that when you worked for the defendant at 444 West 56th Street—you were asked this question at the time, and you were referring to the time that you entered into your employment in 1932; did you have personnel working for you at 444 West 56th Street?

The Court: Are you referring to the record in this [294] case?

Mr. Kostelanetz: Yes, your Honor, at page 207.

A. Yes, sir.

Q. And there was an objection, and you answered: "A. We had a very substantial staff." A. Yes.

Mr. Kostelanetz: Now what I would like to have, your Honor, is as to Item 11 in the subpoena *duces tecum*, pay roll records of National Theatres Corporation of its agents and employees engaged in activities in the State of New York for each and every year for the period of January 1, 1930, to the date of the filing of the complaint.

Mr. Pride: We have been able to find no pay roll records of any sort back in this period as to which you are interrogating the witness, Mr. Kostelanetz. There are none in existence, and that applies obviously to many of the corporate records. This is a period of 23 to 24 years ago.

The Court: You are unable to comply with that request?

Mr. Pride: That is right.

Mr. Kostelanetz: The date of the filing of this complaint is I think September 15, 1951, your Honor, and I wonder if Counsel's statement was intended to cover the [295] period of National Theatres employees working in New York and California continuing right through 1951. I just want it to be understood, Mr. Pride.

Mr. Pride: Well, there are no pay roll records of this sort other than the entries which show the payment by National Theatres Corporation of $3,000 a week to the National Agency Corporation for the services which the National Agency Corporation performed for National Theatres. If that be the pay roll record, why, we will concede here that those payments were made by National Theatres Corporation. As far back as we have the records, there are no pay roll records as such.

Mr. Kostelanetz: In other words, am I clear that there are no individuals employed in the sense we use the term employees, people who get a check periodically for their services, monthly, or quarterly, or whatever it is, that is, salary or wages.

Mr. Pride: No.

Mr. Kostelanetz: Request 13 deals with any and all canceled checks reflecting payment by National

Theatres Corporation for any and all utility services, such as telephone, gas, and electricity within the State of New York and State of California for each year from the period of January 1, 1930, to the filing of the complaint [296] herein.

Mr. Pride: I think there was testimony here that there were no such payments made. That the company used the Twentieth Century Fox telephone, and so forth.

Mr. Kostelanetz: The company paid no utility charges.

Mr. Pride: To the utility companies we made no payments directly.

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Q. Did you pay Twentieth Century Fox in California as well for utilities? A. No.

Q. Only in New York? A. Yes.

Q. You didn't pay in California? [297] A. In California the National Theatres owned the building.

Q. They owned the building? A. They operated their business there.

Mr. Kostelanetz: Could you produce the deed to the building, Mr. Pride, please?

The Witness: No, Mr. Kostelanetz, I beg your pardon. You are confusing it unnecessarily.

The National Theatres had their own building there through a subsidiary. They had offices.

Q. Do you mean, sir, that National Theatres owned some stock in a subsidiary which happened to own the building? A. Yes. Mr. Kostelanetz, I beg your pardon, but what you are trying to find out is exactly what you know; that the National Theatres was a tremendous, big corporation.

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Defendant's Witness, Spyros P. Skouras, Cross

[298] Q. Now, you testified, sir, at page 208 that the western office of your company was in Los Angeles at Washington and Vermont Streets? A. Yes, sir.

Q. Did National Theatres, sir, pay any taxes to the State of California when, as you say, it opened this office? A. That I don't know, Mr. Kostelanetz. I can't keep that detail in mind.

Q. Did National Theatres pay any taxes to the State of California until it actually qualified to do business there sometime in 1952, or so?

Mr. Pride: To facilitate this we will concede they paid no taxes to the State of California. The National Theatres Corporation didn't, but of course its subsidiaries in California did.

Q. Did National Theatres pay any kind of local taxes, Mr. Skouras, in the State of California by way of use, occupancy, sales, or whatever else of that nature?

Mr. Pride: We will make the same concession as to all forms of taxes in that category.

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[299] Q. Did National Agency or National Amusement pay any taxes to California until 1942? A. I don't know this, Mr. Kostelanetz.

Mr. Kostelanetz: Mr. Pride, I have here a telegram from the Secretary of State of California indicating that National Amusement did not qualify in California until August 21, 1942.

Mr. Pride: I believe that is the right date, and we will concede that that is the fact.

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[300] Q. How many companies did you become the president of or the senior official in all over the United States at that time? A. When?

Q. Say from 1932 to 1938.

The Court: What is the materiality of your inquiry?

Mr. Kostelanetz: If your Honor please, I respectfully suggest that I am attempting to point out that the witness, to use the colloquialism I used with Mr. Edmondson when he testified, wore a great many hats.

The Court: What difference does it make. What difference does it make whether he wore a great many hats, overcoats, or went around in a great many shoes?

Mr. Kostelanetz: What I mean is when he was sitting in the office, which was his personal office on 56th Street, he was working of course, but he was working for a great many corporations.

[301] The Court: You didn't answer my question. I want to know what the materiality is.

Mr. Kostelanetz: I am trying to show that when he occupied an office at West 56th Street he was working for other corporations, a great many other corporations, and I believe as many as 50 or 100.

The Court: And then what does that mean?

Mr. Kostelanetz: I think that would have some probative value to indicate, your Honor, that National Theatres was not doing business in the State of New York.

The Court: I can't understand that inference. It is an utterly invalid inference.

Mr. Kostelanetz: Your Honor, at this point I beg for clarification. It seems to me that—

The Court: No matter how many offices he had and no matter what he did, how does it bear on the question of whether the defendant was doing business in the State of New York?

Mr. Kostelanetz: Apparently the defendant seeks a showing here to your Honor that because Mr.

Skouras lived in Mamaroneck and worked in New York at 56th Street, that therefore National Theatres did business in New York within the meaning of the state law concerning service of process in the state.—

[302] The Court: Do you think you can meet that by showing he did other things? That is absurd.

Mr. Kostelanetz: That his presence in 56th Street was referable to other things.

Q. Mr. Skouras, could you tell, sir, at any given moment of any given day, let us say a particular day, what company you were working for?

Mr. Pride: I object.

The Court: Sustained.

Q. Now, you testified on your direct examination in substance at page 216 that all film contracts for Wesco and its subsidiaries were negotiated in New York. Is that correct? A. Practically all.

Q. And I think we have already established that Wesco or National Theatres itself did not sign the contracts. Is that correct? A. That was my impression. Maybe you are right. But an instrumentality, a corporation of some kind, signed the contracts.

Q. Some corporation signed the contracts? A. That is correct. But National Theatres were responsible.

Q. Do you mean morally responsible, or was there a written guarantee? A. Morally.

[303] Q. No written guarantee? A. No, sir.

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[305] Q. I think you testified that the office of National in New Jersey was closed and the accounting department and employees came back to New York, is that right? A. Yes, sir.

Defendant's Witness, Spyros P. Skouras, Cross

Q. And that would be around what year? A. Either 1936 or 1937.

Q. Now, after 1936 and 1937— A. (Interposing) Or 1937.

Q. After 1936 or 1937 did you, and when I say you I mean [306] National Theatres Corporation, attend meetings in Jersey? A. For a short period of time. Only a directors' meeting.

Q. Only a directors' meeting? A. For a short period of time.

Q. And when you say short period of time you mean how many years? A. I don't remember exactly.

Q. Would it be as many as two or three years?

Mr. Pride: The minute books are here, your Honor.

Mr. Kostelanetz: If you can give me the fact I will accept that, Mr. Pride.

Mr. Pride: Yes, to expedite this, I believe the dates with respect to these meetings of the Board of Directors which were held in this manager's office in the State Theatre Building in Jersey City were from the middle of 1936 until sometime in January of 1944.

Q. To January, 1944? A. That is right. When the stock was bought from the Chase Bank.

Mr. Kostelanetz: Now, I wonder if counsel would be good enough to produce the franchise state tax report of National Theatres for the years, let us say, 1930 to 1940 in New York State.

Mr. Pride: I thought I had stipulated that there [307] were no state franchise taxes paid by National.

Mr. Kostelanetz: I thought it was in relation to California. Maybe I am being confused.

Mr. Pride: Both places were asked for and I stipulated to that.

Mr. Kostelanetz: All right.

Q. Now, Mr. Skouras, just to make a part of your direct examination crystal clear, you testified at page 231 that the Agency Corporation had certain people on their pay roll, and then you in answer to the question: Did the corporation have accountants and bookkeepers on the pay roll, which corporation Mr. Pride identified as the Agency, and you answered that "It had the same premises as the National, it was the same people, it was actually the same people, it was not even different people"?

And I think there was some objection, sir, and my question now is to try to make this crystal clear that National had nobody on its pay roll but that it was the Agency that had people on the pay roll? Is that right?

* * * * * * *

[308] A. Yes, the Agency was—the pay roll was paid by the Agency, and also my pay was coming from the Agency, but the participation that I had with my brother was coming from the National Theatres.

Q. Let me understand this: As far as a check was concerned, the check which you received was the Agency check; is that correct? A. As I said, the salary, but the participation was also a check from the National Theatres.

Q. From National Theatres or Agency? A. The Agency was the salary, the straight salary.

Q. I see. A. The participation was from the National Theatres.

Q. That was some kind of a bonus; is that right? A. I beg your pardon, it was a very substantial part of the salary.

Q. Yes, I see.

That was part of the initial contract; is that right? A. Correct, sir.

Defendant's Witness, John F. Caskey, Direct

Q. But as far as individuals other than yourself or the [309] "managers," so-called "managers," as far as they were concerned, no one else was on the pay roll of National? A. You are right, Mr. Kostelanetz.

* * * * * * *

[311] Mr. Pride: I will call Mr. Caskey.

JOHN F. CASKEY, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Pride:

Q. Where do you reside, Mr. Caskey? A. Stamford, Connecticut.

Q. What is your position? A. I am an attorney and counselor at law and member of the bar of this state and of this court.

Q. And were you an attorney qualified, as you have stated in those respects, in the year 1941? A. I was, sir.

Q. Mr. Caskey, I show you Plaintiffs' Exhibit 5 in this case, being copies of certain papers filed in an action entitled Hillside Amusement Company against Warner Brothers Pictures, *et al.*, and I ask you if you were familiar with that litigation? A. I was.

Q. At the time when it was instituted? A. Yes, sir.

Q. Did you take any part in a professional capacity in the conduct or direction of that litigation? A. I did.

Q. In what respects, sir? A. About February 26th [312] or 27, 1941, Mr. John Edmondson, who was on the stand yesterday, telephoned me and stated that he had been served with a summons and complaint in what we now know as the Hillside case, and what should he do with it. I told him to mail it down to me.

Defendant's Witness, John F. Caskey, Direct

Q. Well, from and after that time were you generally in charge of the defense of that litigation on behalf of National Theatres Corporation? A. Yes, sir, subject of course to the fact that I had three senior partners.

Q. In the handling of the case, were you generally in charge of it? A. Yes, sir.

Q. Now, Mr. Caskey, I ask you to look at that Exhibit 5 which you have before you. A. I have looked at it, Mr. Pride, just a minute ago.

Q. Do the papers which comprise that exhibit constitute a complete copy, a complete set of the papers on file which relate to this motion which is the subject matter of Exhibit 5? A. They do not.

Q. Now, Mr. Caskey, do you recall that in or about October 7, 1941, the defendant National Theatres Corporation filed a general appearance in this action? A. It did.

Mr. Kostelanetz: I object to it. If there are [313] any papers, then I have no objection.

Mr. Pride: Here is the paper (indicating).

By Mr. Pride:

Q. Mr. Caskey, I show you what purports to be a copy of such a general appearance, not gotten from the court files, but from office files, and I ask you if you can identify that as a copy of the general appearance which was entered in the action? A. This is a copy of the general appearance which was served upon the plaintiffs' attorney, and it bears Mr. Samuelson's, attorney for the plaintiffs, signature.

Now, I haven't checked this with the copy actually on file in the courtroom, but it came from our files, and I believe it is the copy, and certainly it is the copy which Mr. Samuelson received.

Mr. Pride: I offer it in evidence.

Mr. Kostelanetz: I have no objection to the receipt of it qualified as such.

I don't know if this paper was ever filed in court. Possibly Mr. Pride could say—

The Witness: Well, I know it was.

Mr. Kostelanetz: There may have been some exchange among the lawyer, I don't know, but I will take their word.

[314] The Witness: I know that it was filed.

The Court: He said he knows that it was filed.

Mr. Kostelanetz: I am sorry.

The Witness: We did appear.

By Mr. Pride:

Q. Now, Mr. Caskey, under what circumstances—

Mr. Pride: I am sorry, will you mark this?

(Document received in evidence as Defendant's Exhibit J, as of this date.)

By Mr. Pride:

Q. Now, Mr. Caskey, under what circumstances was that general appearance entered in this case? A. I will have to go back, Mr. Pride, to February of 1941.

As soon as I received the complaint from Mr. Edmondson, and I think simultaneously a copy of the complaint from Twentieth Century-Fox Film Corporation and also a third copy which had purportedly been served on a Delaware Corporation which was doing business in Louisiana, I was advised by telephone that it was the desire of National Theatres Corporation not to file a voluntary appearance in that action—

Mr. Kostelanetz: Your Honor, I respectfully move to strike it out, it is hearsay, your Honor.

The Witness: It wasn't hearsay—I beg your [315] pardon.

The Court: Are you going to rule on this?

The Witness: No, sir.

The Court: I will overrule the objection.

By Mr. Pride:

Q. Go ahead, Mr. Caskey. A. I talked to Mr. Charles F. Young who was then an attorney in our office and who was just going off to draft, and told him to raise the question of the jurisdiction of the District Court over National Theatres Corporation. I also told him that I was fearful that if we proceeded by motion there that might constitute a general appearance, and that therefore I thought we ought to follow the old state procedure and apply for an order to show cause.

That was the last contact I had with the matter until sometime in the latter part of August or September of 1941.

Mr. Kostelanetz: Your Honor, I don't wish to appear to be waiving the hearsay, therefore I move to strike it out, but having received the prior conversations, your Honor, I don't know if this is a line of testimony on which you have ruled, sir, and I ask for your instruction.

The Court: I will overrule your objection, or if it is a motion I deny it.

[316] By Mr. Pride:

Q. Well, now, directing your attention to the fact that this notice in this general appearance was entered on October 7, 1941, when you came back, as I believe you said in September— A. The latter part of September, as I recall it, and I was shown an opinion by Judge Hulbert.

Q. To what effect? A. Ordering a reference.

Q. Ordering a reference? A. Yes, sir. I was shown affidavits that had been filed by Mr. Edmondson and Mr. Owens, my partner, and Mr. H. C. Cox, and I was also shown, it is my recollection, counsel's affidavits that were filed on behalf of the plaintiff, but they are not contained here in Exhibit 5, and I have not seen them recently.

I reviewed the situation and I advised National Theatres that upon the face of their papers they were defective, and that I was unwilling to proceed further or to proceed with the reference, and that my advice to them was to file a general appearance.

Mr. Kostelanetz: Your Honor, the same motion.

The Court: You object to anything he says.

Mr. Kostelanetz: Well, if your Honor please, I understand that this is hearsay, and I must move.

The Court: Upon whose point?

[317] Mr. Kostelanetz: What he told some unknown person at National.

The Court: He is reporting in his answer the decision in respect to what the client should do.

Is that hearsay?

Mr. Kostelanetz: It would seem that way, your Honor. He is giving his conversations.

The Court: His opinion delivered or expressed to a client is hearsay?

Well, Mr. Kostelanetz, I will give you—I will overrule your objection and you may have an exception to anything he says.

Mr. Kostelanetz: I won't object to this line any more, your Honor, under your Honor's ruling.

Defendant's Witness, John F. Caskey, Direct

By Mr. Pride:

Q. Do I understand you, Mr. Caskey, that you advise—

The Court: The first thing you know Mr. Kostelanetz will take an objection to that form of question because how can anybody say what you understand?

Mr. Pride: You are so right, Judge.

I was trying to develop a little continuity here in view of the interruption.

By Mr. Pride:

Q. Did you advise National Theatres Corporation, [318] Mr. Caskey, as to the reasons why you believed that they should not go forward with this reference but should enter a general appearance? A. I did.

Q. What did you tell them? A. I told them that under the Sherman Act, that the original test of jurisdiction was a three-fold test which had been in the act since 1890, except that the word, that one phase of it was added in 1914, and that was whether a corporation was found, was an inhabitant, or whether it had an agent within the jurisdiction in the district in which it was served, in which the suit was laid. Further, I told them that there wasn't any question in my mind that they had an agent within the Southern District of New York where the venue of the action would lie. I then told them that under Section 12 of the Clayton Act, which related to the modus of service, where you may serve a corporation, that the requirement there was not only, that is one of the requirements was the transacting of business, but there was also the test of agency, and that in my opinion they had an agent. I told them the venue was properly laid in the Southern District of New York, the service was good, and there wasn't anything to do except to appear.

Defendant's Witness, John F. Caskey, Direct

They asked me if I would contact the plaintiffs' attorney and see if he would agree to dismiss them voluntarily. [319] I said I would do that. I did. He would not agree. We served a general appearance and thereafter an answer.

Q. And, Mr. Caskey, following the general appearance, was the motion which had been made to set aside the service in turn withdrawn? And an order entered thereon? A. It was. Whether it was before or after, I don't remember, but it was simultaneously.

Mr. Pride, as I recall, we secured an agreement from the plaintiffs' attorney that National Theatres would have the benefit of a motion which the other defendants in the case had made, that is for a bill of particulars which had been in part granted, but of course had not been granted as to us during this interim period, and they agreed that we should have the benefit of that.

Q. Well, now, I direct your attention to what purports to be a copy of an order entered dismissing the motion and stating that National has appeared in the matter and the matter has become moot? A. That is right, sir, that is our office copy signed by Mr. Samuelson.

Q. Do you recognize the document of which the original was filed? A. This copy is from our files, it was consented to by Mr. Samuelson, and the original, with Mr. Samuelson's signature, was filed in the office of the Clerk.

Mr. Kostelanetz: May I see it, please.

[320] (Document handed to Mr. Kostelanetz.)

Mr. Kostelanetz: No objection, your Honor.

(Document received in evidence as Defendant's Exhibit K, as of this date.)

By Mr. Pride:

Q. Now, Mr. Caskey, again directing your attention to Plaintiffs' Exhibit 5, and calling to your mind the fact that these two exhibits, the general appearance and the

order withdrawing the motion, were dated October 7th and October 15, 1941, respectively, after these papers were filed did the defendant National Theatres Corporation file an answer? A. It did.

Q. And that answer is a part of Plaintiffs' Exhibit 5; is that correct? A. Yes, sir.

Q. Now, Mr. Caskey, was anything said in that answer with respect to National Theatres, that is with respect to the jurisdiction of the Court over National Theatres? A. It was.

The Court: The answer will speak for itself, as the phrase goes.

Mr. Pride: Yes, sir.

I wanted to ask him under what circumstances that particular provision—

The Court: Well, that is another question.

[321] Mr. Pride: Yes, sir.

May I have it, Mr. Caskey?

(Document handed to Mr. Pride.)

By Mr. Pride:

Q. I direct your attention to the third defense set forth in that answer. A. Yes, sir.

Q. And under what circumstances was that third defense pleaded, Mr. Caskey? A. The third defense was pleaded because in my conversation with representatives of National Theatres Corporation, I was told that they did not desire anything to be on file which might be construed as an admission that National Theatres Corporation was subject to the New York tax laws. I advised them that I did not think that this apearance would be so construed, that if there were any question about it, I was willing to set forth the jurisdictional claim as a part of a separate defense, which we did.

Defendant's Witness, John F. Caskey, Cross

Q. In other words, after you had appeared, after the motion was withdrawn, this— A. We pleaded this defense.

Mr. Pride: I believe I have no further questions.

Cross Examination by Mr. Kostelanetz:

Q. Mr. Caskey, you are a member of the firm of Dwight, [322] Harris; you are in the firm title, is that correct? A. That is correct, sir.

Q. And you are now the attorneys for National Theatres as well as for Twentieth Century Pictures or Twentieth Century-Fox, whatever that title is; is that right? A. That is correct.

Mr. John A. Ross: If your Honor pleases, both sides have said that they are through with me.

Am I excused?

The Court: Yes, indeed.

By Mr. Kostelanetz:

Q. Now, Mr. Caskey, you said that sometime in March of 1941 or February of 1941, you received a call from Mr. Edmondson advising you that a paper was served on him which we now know as, I presume, the summons and complaint in the Hillside Amusement case? A. In February.

Q. Yes, in February. A. Yes.

Q. Now, at that point I take it that you conferred with Mr. Edmondson as the representative of National Theatres, or did you confer with some other person? A. When are you talking about, what day are you talking about?

Q. Initially you talked to Mr. Edmondson about it; is that right? A. That is right.

[323] Q. You examined the summons and complaint; is that right? A. That is right.

Defendant's Witness, John F. Caskey, Cross

Q. Now, at this point did Mr. Edmondson give you instructions on how to handle the matter? A. Instructions?

Q. Yes, client's instructions. A. Well, I was informed by someone in National Theatres Corporation, whom I certainly cannot identify at this time, that it did not desire to file a general voluntary appearance.

Q. Now, could you identify the person who said that National did not want to file a general voluntary appearance? A. I have no present recollection of it, I can make, I can hazard a guess as to whom it would have been, but I have no knowledge, no present memory at all.

Q. It is out of your mind; is that right, sir? A. Yes.

Q. Mr. Caskey, is it the practice of your firm and members of your firm to keep diaries? A. Yes.

Q. And is it the practice of your firm to retain those diaries? A. Yes.

Q. Before testifying here, did you check your diary for the entry as to whom told you that they, that National did not want to file a general appearance in this case? A. It is our position that our diaries are confidential. [324] Contents of them.

The Court: The question is whether you did.

The Witness: I looked in my diary, yes.

Q. Did that help fix the name of the person? A. That is calling for the content of it.

Q. I am sorry, but is it your position that it would be confidential for you to say who it was that gave you those directions? A. If I had an independent recollection of it, sir, I would tell you. I have none. And my diary does not refresh my recollection.

Q. My question is before you took the stand to testify did you look in your diary to see who gave you instructions? A. I did. There is no such entry. There is no entry involving this case in the months of February and March.

Defendant's Witness, John F. Caskey, Cross

Q. Well, now, can you say, sir, whether you did any work at all in the month of February on this case? A. I had a conference with Mr. Young, as I previously testified.

Q. And you gave him what instructions? Would you repeat those, please? A. I don't recall any instructions. I told him I had been advised that it did not desire to file a voluntary general appearance, and that accordingly he had better raise the question [325] of the jurisdiction of the Court.

I further told him—we do not give instructions—that I thought if he filed a motion it might be construed as a general appearance and therefore suggested to him that he follow the old state practice of applying for an order to show cause so there wouldn't be any question that our initial step in the matter constituted a general appearance.

Q. So at this point at least in February of 1941 that was your sole contact with the case, as you recall it? A. That is right.

Q. How about March, 1941, Mr. Caskey, did you have any further contact with the case? A. I had no further contact of which I have any recollection until September or October of 1941.

I was out of the city on trial most of that time. I went to California on either the 2nd or 3rd day of March. I returned towards the end of March. And I was in the office one day. Then I went to Portland where we were on trial in a case called *Dondis versus Waldo*, an anti-trust suit, and was there continuously until sometime in the summer of 1941.

Q. I call your attention, Mr. Caskey, to Paragraph 12 of Mr. Edmondson's affidavit, which reads as follows:

I have consulted the general counsel of National Theatres Corporation, Messrs. Dwight, Harris, Koegel & Caskey, [326] 100 Broadway, New York, and have been

advised by them that in their opinion National Theatres Corporation does not transact business within the territorial jurisdiction of the District Court of the United States for the Southern District of New York, and that it is not an inhabitant nor can it be found within the territorial jurisdiction of the Court. A. That is the language of Section 12 of the Clayton Act.

Q. Was it you who advised Mr. Edmondson as set forth in Paragraph 12? A. It was not. My construction of the word "found" in the statute—

The Court: He did not ask you for that.

The Witness: All right, your Honor.

Q. Did you have anything to do, Mr. Caskey, with physically dictating or constructing Mr. Edmondson's affidavit? A. I did not.

Q. Do you know, sir, who did? A. I do not. I have an opinion on the subject, but I don't know.

Q. Well, would it show in your records who did? A. It doesn't show in any record of mine. I have an opinion on the subject.

Q. Did you review Mr. Edmondson's affidavit, Mr. Caskey, before it was submitted to Judge Clancey? [327] A. I did not.

Q. Now, Mr. William Owens was your partner back in 1941, and I believe he is still your partner, is that right? A. I can't tell you the date he was admitted to partnership, but he is and he has been a partner for many, many years.

Q. Yes. Mr. Caskey, Mr. Owens' affidavit has certain statements in it—this is verified July 9, 1941—concerning, as the affidavit says, his own knowledge that National Theatres Corporation has not at any time since June 10, 1937, had an office or place of business at 56th Street or anywhere else in the Southern District of New York. Did you draw that affidavit? A. I did not.

Defendant's Witness, John F. Caskey, Cross

Q. Did you have anything to do with that affidavit? A. I reviewed it in September or October, 1941.

Q. After Judge Hulbert's opinion? A. Yes. I do not agree with it.

Q. Judge Hulbert's opinion, being July 11, 1941, so this would be a month or two after his opinion? A. That is correct.

Q. Now, the purpose of the plaintiff in this case, Mr. Caskey, was to get jurisdiction or venue over this corporation, or both, is that right? A. Both.

[328] Q. Both? A. Yes.

Q. And in that connection did you advise the defendant, the National Theatres Corporation, after reading Judge Hulbert's opinion, as to your views? A. I did.

Q. And whom in National Theatres Corporation did you so advise, sir? A. I have no recollection.

Q. And your diary doesn't show? A. That is right.

Q. You have not the faintest idea with whom you talked? A. Oh, yes, yes, indeed I do.

Q. But you can't, sir—after all we have to have sworn testimony here—tell me. A. That is why I didn't give it to you.

Q. Your best recollection is you can't just tell me the person to whom you talked? A. I do not recall at this time the person to whom I talked. I certainly have an opinion as to whom I talked to.

Q. And at that time did you tell him that the new rules of civil procedure were in effect? A. I am certain that I did not. I have no recollection of it, but I am sure I didn't tell him any such thing.

Q. Well, whoever it may be, and we will call him Mr. X for short— [329] A. I didn't tell him anything about the new rules.

Q. You knew of course that the new rules were in effect, is that right? A. No. I have considerable doubt

as to how far they were in effect, and there still is, and certainly it was in 1941.

Q. Did you know, sir, in 1941 that under the new rules, as they were then called, you could plead in an answer—in effect you could plead a special appearance as well as a defense on the merits? You knew that, didn't you? A. I didn't know that, sir. I knew what the words of the new rule said, but in my opinion it was a very risky thing to do. That in my opinion in 1941 it was a very risky thing to do. The Supreme Court of the United States had held in a case that came up in Ohio that filing an answer was a general appearance, and I was not prepared to take that responsibility. So that is why I told Mr. Young that I recommended to him, or suggested to him, that we follow the procedure which we had always followed in the state court, where most of the jurisdictional questions came up, by submitting an order to show cause and getting the Court to sign the order to show cause and then you do not take any risk with the general appearance.

Since 1941 the law has become probably more crystalized on that question.

Q. Is it a fact, sir, that the rules in substance, the [330] new rules in substance, permitted you to file or rather to set forth in an answer a special appearance as well as to plead on the merits? A. I believe that is my recollection as to what they were in 1941.

Q. Yes, of course. So that you knew, Mr. Caskey, that when you set up a defense in an answer, which prior to the new rules sounded just like a special appearance, that this was something that you had a right to plead and to prove in your case? Isn't that correct? A. No, sir. I didn't know that in 1941.

Q. You didn't know that in setting up a writing in an answer which says that the Court is without jurisdiction over the defendant, and the Court is without venue over

the defendant, and that the defendant is not an inhabitant of the state, and so on and so forth, and can't be found, that you could not prove that under this pleading and win your case? A. No, sir. I didn't know that. I was unwilling to take that responsibility in 1941.

Q. But you set it forth in any event? A. When we filed the answer we had appeared—there was no question then about a general appearance—we had appeared when we filed the answer.

Q. And in the same answer you also stated as a separate [331] and distinct defense that in substance you were in here for Clayton Act purposes? A. We were there. We had appeared in the court at that time then.

Q. In filing the answer, sir, and an amended answer as well in 1945, four years later, and I say this very seriously, did you advise the Court that this answer in substance does not really mean anything but it is to cover a tax purpose?

Mr. Pride: I object to that.
The Court: Sustained.

Q. So that actually, sir, this so-called third defense, or affirmative defense which you had raised in Exhibit 5, really didn't have good affirmative ground to support it, is that right, sir? A. I didn't say that, sir, at all.

Q. You didn't say that? A. No, sir.

Q. In your belief it had good affirmative ground to support it? A. Do you want my belief as to whether it would be sustained after a trial of the case? I simply would have won.

Q. It would have good affirmative ground or support that the Court is without jurisdiction as to the defendant and without venue as to the defendant? A. We had filed a general appearance, Mr. Kostelanetz.

Defendant's Witness, John F. Caskey, Cross

[332] Q. Yes, but was there good support for the proposition which you set forth in the third defense at the time that you filed it, sir?

Mr. Pride: I submit the witness has testified that he advised his client that the defense could not succeed as far as venue under the Clayton Act was concerned. That is his testimony.

Q. Do you adopt Mr. Pride's statement? A. I stated on my direct testimony that I advised the client that they couldn't contest jurisdiction of the District Court of the Southern District of New York in this Hillside action. That is, I mean they couldn't contest it successfully.

Q. Now, Mr. Caskey, I respectfully call your attention to Rule 11 concerning signing of pleadings: That the signature of an attorney constitutes a certificate by him that he has read the pleading and that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay, and so on.

Now, is that also true, sir, that at the time you signed the pleading you to the best of your knowledge, information and belief knew there was good ground to support it, sir?

Mr. Pride: I object to the question.
The Court: Overruled.

[333] A. I considered that the answer which we filed, after we had filed the general appearance, was a proper answer in compliance with the rule—in compliance with the rule which you have read to me.

Mr. Kostelanetz: I have nothing further.
Mr. Pride: No further questions.

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Defendant's Witness, Spyros P. Skouras, Cross

[334] SPYROS SKOURAS, called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (continued) by Mr. Kostelanetz:

Mr. Kostelanetz: If your Honor please, I respectfully offer in evidence Exhibit 21 for identification, which is the contract between Fox West Coast Agency Corporation and National Agency Corporation, the paper being produced by the defendants.

Mr. Pride: No objection.

(Plaintiffs' Exhibit 21 for identification was now received and marked Plaintiffs' Exhibit 21 in evidence.)

Q. Now, Mr. Skouras, I will try to be very brief, sir, in connection with the company maintaining this room in the State Theatre Building over in New Jersey for directors' meetings, is it correct that that was to satisfy the whim of a lawyer? A. As far as I am concerned, the position I have taken, that for the franchise taxes that it would have saved, I considered it very inconsequential when you take into consideration the need of the personnel, and the accounting department of the National Theatres at the time when we were negotiating with the film companies. And, peculiarly, everybody agreed with me except Mr. Julian Hagen.

[335] Q. But is it correct, sir, that everybody laughed at the idea? It was the best laugh you had in a long time about this situation? A. That I never heard of. I don't know.

Q. But you testified in an examination before trial at page 24—

The Court: Examination before trial?

Mr. Kostelanetz: Yes, in this case at page 24, Mr. Pride.

Defendant's Witness, Spyros P. Skouras, Cross

Q. Wherein, right after Mr. Pride's statement that the testimony of the witness is that no office as such was maintained at the Hudson Boulevard address, but rather that the company used a bare room in the State Building there for directors' meetings from time to time, and did you say, sir: To satisfy the whim of a lawyer. Only to satisfy his whims. And everybody laughed. We laughed at the idea. It was the best laugh we had in a long time. Did you so testify, sir? A. I was flippant in saying that. I was trying to express—

The Court: Well, you gave that answer?

The Witness: Yes.

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[338] Q. Is it true that the defendant Twentieth Century owned all the stock of the defendant National? A. Correct.

Q. And that the defendant National owned all the stock of the defendant National Theatres Amusement Company, Inc.? A. Correct.

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[340] Q. Now, to and including 1952, is it true that National has not had and does not have an office in the State of California, nor has it engaged in or conducted; nor does it conduct or engage in any business in the State of California. Is that true? A. No, sir.

Q. Is it true that National has never been found, or present, or had any agent in the State of California? A. Not according to my understanding.

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Defendant's Witness, John B. Bertero, Direct

JOHN B. BERTERO, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Pride:

Q. Mr. Bertero, where do you reside? [341] A. I reside in Los Angeles, California.

Q. How long have you been a resident of Los Angeles? A. Since December, 1910.

Q. And you have been continuously a resident from that date to the present, is that correct? A. I have.

Q. Mr. Bertero, are you a lawyer? A. I am.

Q. Are you admitted to practice in the State and Federal Courts of California? A. I am.

Q. What is your present occupation, Mr. Bertero? A. I am vice president of National Theatres, Inc., and president of Fox West Coast Theatres Corporation, its principal subsidiary.

Q. How long have you held those positions, Mr. Bertero? A. I have been a vice president of National Theatres, Inc., since its incorporation in September, 1952, and president of Fox West Coast since the death of Charles Skouras in October of 1954.

Q. And this National Theatres, Inc., was that the successor to National Theatres Corporation, the defendant in this case? A. Upon the divorcement of Twentieth Century-Fox Film Corporation from National Theatres Corporation, Twentieth Century-Fox [342] donated the stock of National Theatres Corporation to a newly-formed corporation, National Theatres, Inc., and the stock of National Theatres, Inc., was distributed to the share holders of Twentieth Century-Fox. And about a year later in September, 1953, National Theatres Corporation was dissolved.

Q. Now, Mr. Bertero, prior to its dissolution were you an officer of National Theatres Corporation, the defend-

ant in this case? A. I was in September, 1952, until its dissolution in September, 1953.

Q. What position did you hold there? A. I was vice president and director of the company.

[343] Q. Now, Mr. Bertero, for how long had you performed services for National Theatres, Incorporated, or National Theatres Corporation? A. I have been in the employ of one of its subsidiaries since 1930, October, 1930.

Q. In California? A. In California.

Q. And what company was that, sir? A. I became engaged by Fox West Coast Service Corporation in that year, 1930, and became an officer of the company and most of the subsidiaries of Fox West Coast Theatres.

Q. Now, by whom were you paid, Mr. Bertero? A. By Fox West Coast Service Corporation.

Q. What was the nature of that corporation? A. All its stock was held by Fox West Coast Theatres, a California corporation, and that company, Fox West Coast Service Corporation, performed numerous services for Fox West Coast Theatres and for the various subsidiary corporations of Fox West Coast Theatres.

Q. I see.

And the Fox West Coast Theatres Company that you have said you were employed by—well, let me rephrase that.

What was the interest of National Theatres in that corporation? A. Fox West Coast Theatres was a wholly-owned subsidiary of National Theatres Corporation.

[344] Q. How many theatres, approximately, in California were operated at the time you went with this company through this subsidiary of National Theatres? A. I would estimate somewhere around 185 to 200 at that time.

Q. When you entered upon your employment for this company in 1930, what were your duties, Mr. Bertero? A. Well, in the early years, mainly they were legal duties,

handling the legal affairs of the various Fox West Coast companies. I was also an officer, the assistant secretary, for a period of years, and I attended generally to the affairs of the company, such affairs as came to my attention and I was asked to handle.

Q. You were on a full-time basis? A. Yes, sir.

Q. Now, in the performance of these duties, Mr. Bertero, were your services rendered to any particular corporation, or were they rendered to several—let me rephrase that.

The performance of your duties, were they confined to working for any one company? A. No, I attended to all matters affecting the National Theatres Service Company, anything that came to my attention and which it was my responsibility to discharge, I took care of the matter regardless what the matter was or the ownership [345] of the theatre.

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Q. Well now, Mr. Bertero, directing your attention particularly to the period from 1932 through 1938, do you recall what services you performed in California for National Theatres Corporation?

Mr. Kostelanetz: Can he fix the time a little better?

The Court: 1932 to 1938, that is a period.

By Mr. Pride:

Q. Well, take the period, Mr. Kostelanetz wishes it broken down more, take the period from 1932 to 1935, Mr. Bertero. A. Well, I should say that routinely I handled many matters that were related to National Theatres Corporation, the examination of a lease, the examination of title documents to theatres that were not directly owned by Fox West Coast Theatres or any of its subsidiaries, the [346] discussions with Mr. Skouras, the

co-manager of National, of problems involving theatres located in other parts of the country, the discussion of fiscal matters involving the National Theatres Corporation as a whole—those matters were matters of routine.

In 1932, the highlight in my mind was Mr. Skouras asking—

Q. Which Mr. Skouras? A. Mr. Charles P. Skouras, who was then the co-manager of National and with residence in Los Angeles, he directed me to go with Mr. Buckley, who was my superior counsel at the time, to New York and to engage in discussions regarding the borrowing of money from the Chase National Bank. It was a large-sized job, I was quite young, and I was impressed with the matter, and I spent some period of time in the city here. Then I returned to the Coast and took care of those details which had to be handled on the Coast.

I participated pretty well in the matter, and brought it to a consummation at our end. That happened in 1932.

Mr. Kostelanetz: I hesitate to interrupt at this point, your Honor, but might I ask that there be stricken out up to the conclusion, that is when he said that in 1932 he went with Mr. Buckley on the Chase matter?

The Court: Denied.

[347] By Mr. Pride:

Q. When you say on your end, I take it that you mean—A. The Pacific Coast, Los Angeles.

Q. What was it that you did in California in this respect? A. Well, in the arrangements made with the Chase Bank for the borrowing of money, we had to put up collateral, prepare notes, have the notes endorsed by National Theatres, pledge the securities called for by the loan agreements, and there was quite considerable bulk of documents, and I prepared a good part of the

instruments, or at least went over the instruments with other lawyers, and did such part as was committed to my personal charge.

Q. Thank you.

Now, in the same period between 1932 and 1935, do you recall any other matters as to which you performed services for Wesco Corporation? A. Well, in late 1932 there were discussions going on concerning the impending bankruptcy of a subsidiary of National Theatres Corporation which operated theatres in Oregon and Washington, and although I only played a minor part in that, Mr. Charles Skouras in Los Angeles asked me to attend to certain matters involving looking up lease obligations, ownership of properties, and various details that he wanted to have in mind in giving the evaluation to [348] that problem that was facing him in a few months.

Q. Now, just to interrupt you, these you say were theatres in the States of Oregon and Washington? A. Yes.

Q. Did this company, Fox West Coast, have any interest in those theatres? A. No, it did not. The stock of that company, the Pacific Northwest Theatres, Incorporated, was owned directly by National Theatres Corporation.

Q. I see.

Would you proceed, please?

The Witness: Was there a general question, Mr. Pride, what I did between 1933 and 1935?

Mr. Pride: I thought I phrased it that way, that is as to whether you can recall any other matters that you had worked upon.

A. Well, as I say in day-to-day operations I would from time to time bump into a matter involving National Theatres Corporation and would give Mr. Skouras such advice or information as he desired.

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Defendant's Witness, John B. Bertero, Direct

[349] By Mr. Pride:

Q. Now, in 1933, Mr. Bertero, did any other subsidiaries of National go into bankruptcy? A. Well, of course Fox West Coast Theatres, the largest subsidiary, the California corporation, filed a voluntary petition in bankruptcy in February of 1933. Another one of the subsidiaries, a large one, Fox Rocky Mountains Theatres, also filed a voluntary petition in bankruptcy in March, 1933, in Kansas City, Missouri, and there were one or two others that were of a smaller nature, affecting smaller companies.

Q. Now, in connection with those bankruptcy proceedings, do I understand that the stock of these other companies, Fox Rocky Mountains and so forth, that they were owned directly by National, or were they owned through Fox West Coast [350] Theatres? A. The stock of Fox Rocky Mountains, as I recall, was owned by Fox West Coast Theatres.

Q. Well now, in connection with the bankruptcy proceedings, those subsidiary companies, did Wesco take any part in those bankruptcy proceedings?

Mr. Kostelanetz: If your Honor please, I respectfully object, if any of this is written down. I presume Wesco took part means filing papers, doing things of that sort, at least in the bankruptcy proceedings as denominated in the question.

The Court: You may cross examine when it comes your turn.

A. Well, National Theatres Corporation, which was formerly known as Wesco Corporation, was one of the largest creditors of the bankrupt I have named, and I can well remember that it purchased at the sale in California, and also at the sale in Kansas City and at the sale in Seattle.

Defendant's Witness, John B. Bertero, Direct

Q. Purchased the assets you mean after the bankruptcy? A. Yes, at the bankruptcy sale.

Q. Do you know whether National or Wesco appeared in the bankruptcy proceedings in California and filed claims there? A. Oh, yes, it had a crew of men there constantly because of the size of the claim, the importance of the matter, and it had its representatives on the ground. [351] Q. Who were they, Mr. Bertero? A. Well, they had local attorneys and then members of the firm of Dwight, Harris, Koegel & Caskey, they were on the ground. Mr. Spyros Skouras was there frequently. It was Mr. Shipman of the Mudge, Stern firm—I don't know the true name of that firm—but he was representing the Chase National Bank which was also a very substantial creditor and he was frequently in California.

Those are the only names I can remember after twenty years.

The Court: You also appeared, did you?

The Witness: No, your Honor, I was with the bankrupt company, which was a wholly-owned subsidiary of National Theatres at the time it went into bankruptcy.

The Court: But you did appear in the bankruptcy for the bankrupt?

The Witness: Yes, your Honor.

By Mr. Pride:

Q. Did you have any dealings with these individuals whom you have said were representing Wesco there at the time? A. I participated in conferences between the trustees in bankruptcy and between the principal creditors. There were numerous conferences involving administration of the estate and possible liquidation of the estate.

[352] Q. Now, I think you have testified, Mr. Bertero, that the assets of the bankrupt subsidiaries were then pur-

chased from the trustees in bankruptcy by National or by Wesco; is that correct? A. That is correct.

Q. And when did that sale take place?

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Q. You understood my question? A. Yes.

The trustees' sale to National Theatres Corporation took place in February, 1935, at Los Angeles, California.

Q. And that was the sale of the assets the trustees held of the bankrupt estate? A. Correct.

Q. And that took place in Los Angeles? A. It did.

Q. Now, in that same year, in 1935, let me ask you, Mr. Bertero, do you recall any litigation in California against National at that time? A. Two parties filed an action against a group of defendants, among which were included the trustees of the bankruptcy, the bankrupt, the principal assets or assets of [353] which was the new Fox West Coast Theatres Corporation and National Theatres Corporation, and the object of the suit was to set aside the bankruptcy on the basis that it was fraudulent. The defendants prevailed in the lower court and prevailed in the Circuit Court of Appeals, and a writ of certiorari was asked of the Supreme Court, but that was denied, and the case came to an end in about 1936, I believe, or 1937.

Q. Do you know whether National was represented by counsel in that action? A. It was.

Q. By whom, sir? A. The firm of Lawler & Degnan of Los Angeles, with Mr. Max Felix of the Lawler & Degnan firm, was counsel of record for Fox West Coast Theatres Corporation, and the firm of Pillsbury, Madison & Sutro of San Francisco represented the National Theatres Corporation.

Q. Did you perform any services for National in connection with the defense of this action, Mr. Bertero? A. Well, I think I made the appearance for Fox West Coast

Theatres Corporation in that action, and I collaborated with all to defeat the plaintiff's claim, and we were successful in doing that.

Q. Do you recall specifically whether you worked on the answers filed? A. I spent a lot of time on the case; it is all out of mind now some twenty years later.

[354] Q. What was the name of the case, by the way, Mr. Bertero? A. Tally & Corbar vs. Fox Film Corporation and others.

Q. Did National file any motions or plead any defenses to the jurisdiction of the court in that action?

Mr. Kostelanetz: I object, your Honor.

The Court: Overruled.

A. Mr. Pride, I have no recollection that it did, but it is a long time ago; I couldn't say, I just have no recollection that it did, and I think I would have remembered had it done so.

Q. As far as you know today, ough, National did appear in the action? A. Oh, yes, it appeared.

Mr. Kostelanetz: I object to it as leading.

The Court: Mr. Kostelanetz, didn't you hear him say that there had been an appearance?

Mr. Kostelanetz: No, your Honor, he couldn't recall in the last answer.

The Court: I overrule your objection.

By Mr. Pride:

Q. Now, Mr. Bertero, in this same year, 1935, do you recall the institution of any other litigation in California involving National or its subsidiaries? A. Yes, there were I think three anti-trust actions filed [355] in California, two in Los Angeles and one in San Francisco, in which National Theatres Corporation or its subsidiaries were named as defendants.

Defendant's Witness, John B. Bertero, Direct

Q. Well, now— A. I should say among the many defendants, I should say named among the many defendants.

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[380] Q. Now, Mr. Bertero, you testified yesterday as to certain matters on which you worked for National Theatres Corporation in the year 1935 and earlier years.

Now, do you recall any other matters that you worked upon in Los Angeles for National Theatres in the years [381] between 1935 and 1938? A. Last evening I recalled a specific matter. I was sent to Montana and Idaho by Mr. Charles P. Skouras, I believe around 1937, for the purpose of examining our theatres, making recommendations concerning lease renewals, possible purchases of fees, renovation of theatres, and also I was requested by Mr. Skouras to bear in mind that he was working on a plan of possible realignment of the divisions of National Theatres Corporation, and that at some future date a new division might be made of the theatres in Montana, Idaho, and the neighboring states. That trip took a number of weeks, as I recall, and I did a lot of work of the nature that Mr. Skouras requested me to do. That I remember particularly because of the trip and a subsequent trip which had some relation to the prior one.

Q. Well, do you recall whether or not in the period that I have asked you about, 1935 to 1938, following the bankruptcy proceedings of Fox West Coast Theatres, there was a general realignment of the corporate structure of National? A. Yes, there was a definite decided reorganization and realignment in 1935, but the matter I have referred to was a possible readjustment of that, and that took place in or about 1937, possibly 1938—I don't recall when.

Q. Well, in connection with the reorganization and realignment [382] in 1935, did you participate in that?

Defendant's Witness, John B. Bertero, Direct

Mr. Kostelanetz: I object to that, your Honor, as leading and suggestive.

The Court: Overruled.

A. I don't have any individual recollection at this date of any conversations. It is difficult for me to think of the day-to-day talks which I engaged in back that far.

Q. Now, do you recall any other matters that you worked upon for National in that period, Mr. Bertero? A. Well, not specifically. It obviously would be rather a highlight of my life to me for me to remember at this time. I just don't recall anything of particular importance, but I was constantly engaged in examining leases, looking at financial data, etc., and in the routine affairs of the company: I don't remember those things.

Mr. Kostelanetz: If your Honor pleases, I move to strike "constantly engaged," I move to strike from that point.

The Court: I will strike it, but can you imagine in what way that is going to be prejudicial to your case?

Mr. Kostelanetz: Your Honor, I respectfully suggest the witness has testified that he was an employee of Fox West Coast Theatres Corporation, and it seems that the area of effort is important in this case, if what he is trying to do is to say—

[383] The Court: I have granted your motion.

Mr. Kostelanetz (continuing): —is to say that he worked for National.

The Court: I have granted your motion.

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[384] By Mr. Pride:

Q. Mr. Bertero, you referred here to Mr. Charles P. Skouras in connection with your work in California. Now, for how long did you know Mr. Charles P. Skouras? A.

Well, he first came to Los Angeles in 1932. My recollection is that I met him in March of that year, and I knew him until his death in October of 1954.

Q. And during that period, where did he reside? A. He resided always in the Los Angeles area. Originally in 1934 he bought his home in Beverly Hills; in fact, he owned that home, I think, until the date of his death. He always resided in the Los Angeles area during that period.

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Q. What was Mr. Skouras' position when you met him in 1932? A. When I first met him, he was a contract employee of National Theatres Corporation, one of the co-managers of the business of National with his brother. [385] Subsequently, within a week or two after his arrival in Los Angeles, he was elected an officer of a number of the local companies, and he has had many capacities throughout the years, but he has always had a contract of employment with National which gave him the right, with his brother, to manage its theatrical enterprises throughout the world.

Q. Did Mr. Skouras, Mr. Charles Skouras, become an officer of any of the subsidiaries of National Theatres Corporation? A. Well, during, I think within a short time after he arrived in Los Angeles, he became an officer of many of the local companies of the Fox West Coast group, and at other times, that I can't tell at what times, he became an officer or director of companies operating theatres in other states.

Q. To go down with this line, to finish this line of questioning as to Mr. Skouras' position, what positions, if any, did he hold in Fox West Coast or in National Theatres Corporation in the period between 1932 to his death, if you know?

Mr. Kostelanetz: The titles?

Mr. Pride: The offices which he held.

A. He was a director and also, I believe, vice-president or executive vice-president of Fox West Coast Theatres, the California corporation, and I believe of most of its [386] subsidiaries.

In about 1935, he was elected president of each of those companies, and he served in that capacity as president of the Fox West Coast Corporation and as president of each of its subsidiaries down to the date of his death. He was also president of the National Theatres Corporation, and a member of its Board from about 1942 until his death.

Q. Yes. A. And he was also a member of the Board of other companies, theatre operating companies, outside of California, but I don't have any particular specific knowledge concerning his connections.

Q. What was the nature of your work with Mr. Skouras, Mr. Bertero? A. I had been there about eighteen months, been with the company about eighteen months before Mr. Skouras' arrival. I was already an officer and assistant secretary of the company, and I was acting mainly in regard to its legal affairs, taking care of its real property matters, and, I just worked along with Mr. Skouras after his arrival and became rather intimately associated with him in the day-to-day operations of the business. Mr Buckley, my predecessor, had a close connection with him until Mr. Buckley's death, and I more or less succeeded to that close relationship in about 1942.

Q. Well, to about when, sir? A. From about 1942, [387] when Mr. Buckley died.

Q. In connection with your association with Mr. Charles Skouras in the years between, let us say, 1935 and 1938, was the association such as to cause you to be informed as to work which he did for National Theatres Corporation? A. Yes, in a general way I became acquainted with many of the problems that he was working on. It was Mr. Skouras' practice to have his close advisers around him

at all times, and he liked as many people as possible sharing in the problems and trying to arrive at solutions of them, and so during that period I spent many hours in his office, with other people.

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[389] Q. Do you know whether or not, Mr. Bertero, Mr. Spyros Skouras came to Los Angeles between the period 1932 and 1942?

The Court: I think he testified as to that.

Mr. Pride: I think he testified that he had seen him in Los Angeles. I want to find out what the business was that they were doing.

The Court: All right.

A. He came frequently to Los Angeles, perhaps five, six, or seven trips a year. He was a frequent visitor on business.

Q. Would he confer with his brother, Charles Skouras, on these occasions?

Mr. Kostelanetz: I object to it, if your Honor please.

The Court: Overruled.

[390] A. I frequently attended conferences at which both the Skouras brothers were present, and discussed matters affecting the company.

Q. What was the nature of the matters that were discussed?

Mr. Kostelanetz: I object.

The Court: Overruled.

A. Fiscal matters, financial policy, film buying, advertising; it pertained to all the affairs of the company.

Q. Respecting what company? A. The affairs of National Theatres Corporation and its subsidiaries.

Defendant's Witness, John B. Bertero, Direct

Q. In these trips made by Mr. Spyros Skouras, was he accompanied by other people that came to Los Angeles? A. Generally someone accompanied him.

Q. Do you know who they were? A. I can remember—

Mr. Kostelanetz: Objected to, your Honor.

The Court: Overruled.

A. I can remember Mr. Harry Cox, treasurer of National Theatres, coming up from New York on a few trips.

Men in the film buying department in New York frequently came with Mr. Spyros Skouras. And sometimes the avowed purpose of the trip was for a meeting to discuss film buying and other matters affecting National Theatres and its subsidiaries.

[391] Q. Mr. Bertero, are you familiar with a company known as National Agency Corporation, or in later years, National Amusement Corporation? A. Was that the National Theatres Amusement Corporation?

Q. National Theatres Agency Corporation first, and then National Theatres Amusement Corporation. A. I know it by its name, National Theatres Amusement Corporation.

Q. Are you familiar with the nature of the business of that company? A. Generally, yes. I have general knowledge about it.

Q. What was it? A. It was a company designed primarily to render services to these subsidiaries of National Theatres Corporation, and also directly to National Theatres Corporation itself.

For example, it kept the books of account, as I recall, of National Theatres Corporation. It did all the things that National Theatres Corporation could do—

Mr. Kostelanetz: I respectfully move to strike out the answer. We have the contract in evidence here.

The Court: It seems so to me. The contract is in evidence.

Mr. Pride: I thought I could inquire as to what it [392] did under that contract.

The Court: All right.

Mr. Pride: I think his Honor ruled that you could continue, Mr. Bertero.

A. (Continuing) Well, to short-cut it, it performed all the services it obligated itself to perform under the contract.

Mr. Kostelanetz: I move to strike it out, your Honor. That requires a construction of the contract as a part of the answer.

I know your Honor's desire for latitude, but perhaps that is going too far.

The Court: You can cross examine if you think that the witness is unfamiliar with it or gave the answer ill-advisedly.

Q. Did this company, National Theatres Amusement Corporation, establish an office in Los Angeles, Mr. Bertero? A. It did in 1942, as I recall; it removed the accounting department and certain other departments from New York to Los Angeles, and qualified to do business in the State of California.

Q. In 1942? A. In 1942.

• • • • • • •

[393] Q. Where did Mr. Charles Skouras maintain his office? A. In the building at Washington and Vermont Streets, Los Angeles, where my offices are.

Q. Continuously through those years? A. And always have been.

Q. Mr. Bertero, are you familiar with Mr. Irving Epsteen? A. Yes, I know him well.

Q. Who is he? A. He is the man with whom the insurance department of National Theatres Amusement Com-

pany places all the insurance on the properties, and liability insurance for National and its subsidiaries.

Mr. Kostelanetz: If your Honor please, I object to that and move to strike it out. This is National Amusement.

The Court: I deny the motion.

Q. Where did he maintain his office? A. He has always maintained his office in Los Angeles since I first knew him in 1930, and he still maintains his office there.

Q. For what period of time has he performed the services that you have described? A. Since at least 1932.

[394] Q. Where would the insurance, that you have said was handled through him, be placed, Mr. Bertero?

Mr. Kostelanetz: Be placed?

Q. (Continuing) Yes. Where would the arrangements for the insurance be made? A. The negotiations always have taken place in Los Angeles throughout the years; ever since I knew of the man.

• • • • • • •

Q. Mr. Bertero, you have testified concerning certain litigation in California. I want to direct your attention to certain cases, or excerpts of certain cases which have been introduced into evidence in these two cases before the Court.

Mr. Pride: Do you have Exhibit 1, Mr. Kostelanetz?

Mr. Kostelanetz: Yes (handing).

Mr. Pride: And Exhibit 3?

Mr. Kostelanetz: Yes, sir (handing).

Q. (Continuing) I direct your attention, Mr. Bertero, to Plaintiffs' Exhibit 3, being a transcript of certain papers in an action in the Superior Court of the State of

California in a case entitled Jensen and Von Herberg against WESCO Corporation.

Did you participate in any way in that case, Mr. Bertero? A. I have no independent recollection of having [395] participated, but my name appears on the notice of motion—or notice of special appearance and motion to quash service of summons, which you have just handed to me.

Q. What other lawyers were involved in that case? A. Well, the notice of special appearance was also signed by Mr. Charles Buckley, who was senior counsel for the company at the time, and Mr. Albert W. Leeds, who was also senior to me in service and in age.

Q. Mr. Bertero, with respect to this motion to which these papers relate, do you recall whether that motion was ever argued or decided? A. It was not.

Q. What happened in the case, Mr. Bertero? A. Well, I had occasion to look at—

> Mr. Kostelanetz: I object to this, if your Honor pleases. The papers—
>
> The Court: Do you mean your paper ought to be allowed into evidence and not subject to any cross examination?
>
> Mr. Kostelanetz: No, no, no, your Honor. That is not what I meant.
>
> The Court: Overruled.
>
> Mr. Kostelanetz: I am sorry, your Honor I didn't mean that.
>
> The Court: I do not want to hear anything further [396] about it.
>
> Mr. Kostelanetz: I am sorry, sir.
>
> The Court: Go ahead.

A. (Continuing) The plaintiff voluntarily dismissed the action in the Superior Court of Los Angeles County and there was never any decision on the motion. The motion was never argued.

Defendant's Witness, John B. Bertero, Direct

Q. Do you know whether or not that was the end of the litigation in California? A. It was the end of the litigation in California.

Q. Or elsewhere? A. Well, this is just hearsay, but I heard in court that the action was refiled in New York, but I have no knowledge on that subject.

• • • • • • •

[397] Q. Was any position taken in any litigation between 1932 and 1948 by National that it was not doing business or was not amenable to suit in California? A. It filed answers in which it denied that it was transacting business in the state—that it had a statutory agent—but that issue was never litigated.

National in every instance waived the litigating of that issue.

Q. I am asking you, Mr. Bertero, first—

Mr. Kostelanetz: If your Honor please, I move to strike out that "National waived • • •"

The Court: Denied.

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[398] Q. Mr. Bertero, the plaintiffs have introduced as exhibits in this case, excerpts, in I believe it is some eleven or twelve cases which were instituted in California in the period between 1948 and 1951, I believe, and without exhibiting these exhibits to you, Mr. Bertero, are you in a position to say whether you were familiar with each one of [399] these actions in which National was named as a defendant in that period? A. I am familiar to the extent that I always read the complaint at the time the action was initiated, and the complaint was served on our defendants, and then I kept abreast of the action generally by advice from our attorney who handled the action.

Q. Did you cause attorneys to be retained to represent National in these actions? A. Yes, I did.

Defendant's Witness, John B. Bertero, Direct

Q. In Los Angeles, or San Francisco, or wherever it was? A. Yes.

Q. Mr. Bertero, I am afraid I will have to give you the names of these cases preliminarily to the next question I want to ask you.

The names of these eleven cases, Mr. Bertero, are:

Allen Theatres Corporation.

Levy against Paramount.

Allison against Twentieth Century-Fox.

Sturdivant against National Theatres.

Ivan C. Hansen against RKO Radio Pictures.

Markoy against Twentieth Century-Fox.

Parkton against Fox West Coast Theatres.

Southside against Loew's.

Alex M. Mounce against Twentieth Century-Fox Film Corporation.

[400] Skyline Drive-In against Paramount.

James against Twentieth Century-Fox.

Pouros against National Theatres.

And Credito Cinematografico Mexicano against Twentieth Century-Fox Film Corporation.

Having in mind those cases, Mr. Bertero, which if any of them went to trial on the merits? A. I heard you mention the James case. That went to trial on the merits and was decided.

Did you mention the Fanchon and Marco case?

Q. No, sir. It was not included in these exhibits. A. Then the James case is the only one I heard where the issue was tried and a decision reached.

Q. And what happened with respect to these defenses that National had set up in the answer in that case in the litigation of the James case?

Mr. Kostelanetz: If your Honor please, I object to it.

The Court: Overruled.

Defendant's Witness, John B. Bertero, Direct

A. National Theatres Corporation, through its counsel, did not urge the defense, but waived it and went to trial, and the jury brought in a verdict which was entered. Judgment was entered.

Q. The defendant participated in the trial? A. Yes.

[401] Mr. Kostelanetz: I move to strike out "waived the defense" on the trial. I think that is what I heard the witness say. I do not see how that is of consequence.

The Court: Overruled.

A. (Continuing) I should amend my last answer to say that judgment was entered against National Theatres along with other defendants. That is what I meant to make clear.

Mr. Kostelanetz: National lost.

* * * * * * *

Q. Mr. Bertero, with respect to these actions, in California to which National was a party, and the names of which I have put into the record, were you familiar with the pleadings which were filed in each of those actions? A. In ever instance I read the complaint and I also assisted counsel in the preparation of answers, and in other phases of the litigation.

Q. Now, plaintiffs' exhibits respecting these cases, those which I have named, indicated that in each there was a pleading dealing with the jurisdiction of the court in [402] California.

I ask you if you are familiar with the circumstances under which those pleadings were interposed? A. Generally, yes.

Q. Well, what were the circumstances? A. Well, I can remember in one of the original cases in about 1947, 1948, conferring with our attorney in the drafting of an answer, and his suggestion of the plea of the Statute of Limitations—

Mr. Kostelanetz: Can he fix the time and tell us the conferee who was present?

The Court: Do it as far as you can. I imagine it is a difficult thing to think back a dozen years or more and fix details.

A. (Continuing) In about 1947 or 1948, Mr. Frank Johnston, of the firm of Newlin, Holley, Tackabury & Johnston, was engaged in representing our company in one or two of these actions which was filed at about that time, and he also represented us in later actions.

I can remember a conference in my office when Mr. Johnston presented a draft of the answer to one of these early complaints—

Q. Do you mean in 1947 and 1948? A. Yes, the 1947 or 1948 case. And we went over the form of the answer. I can [403] also remember Mr. Johnston stating that he was going to raise the pleading of the one-year Statute of Limitations, which rather surprised me. And I can also remember that he discussed the question of the denial of the plaintiffs' allegation that National Theatres Corporation was transacting business in the State of California. I don't remember the particular discussion. But the conclusion reached was that we should deny that allegation. The allegation to the effect that National was transacting business in the State of California. And of course denying that it had a statutory agent for the service of process, because it never had any.

And then I can remember, after a lapse of some time, when Mr. Johnston and I again had a conference. And it was important to him that we take a position on whether he should urge the defense that National was not transacting business in the State of California. And he and I agreed that the defense would not be urged upon the Court or litigated.

Mr. Kostelanetz: If your Honor please, it seems to me that if the date could be fixed here, and if the date is after the filing of this complaint, then I would move to strike it out.

Mr. Pride: He has fixed the date.

The Court: There has been nothing indicated thus far to show it was after 1951.

[404] Mr. Kostelanetz: No. He said later on, without fixing a date.

The Witness: Didn't I say within a year or two? I have no definite recollection.

Mr. Kostelanetz: Well, it was before 1951?

The Witness: I could fix it by a specific case. I think it was in the case of Fanchon and Marco versus someone else that the decision was made. I believe that was the case. And Mr. Johnston and I agreed that that phase of the answer should not be litigated.

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[405] Q. My question, Mr. Bertero, was directed to the specific eleven cases which represent excerpts from the plaintiffs' exhibits in this case, and they are all in this period from 1948 to 1951. The case which you mentioned, the Fanchon and Marco case, is not one of those cases. Therefore, I am directing your attention solely to these eleven cases, and I am asking you in each of those what were the circumstances which led to the interposition of the defense that was pleaded in each case? A. I do not have any specific recollection of my conversations with Mr. Johnston at this meeting in 1947 or 1948.

I do recall a conversation, not in detail, with Mr. Cox about the allegation to the effect that we were transacting business in the State of California, and the adoption of the position that we didn't want to have on the public record any admission that we were transacting business in the state because of the possible use by the State

Franchise Tax authorities, as an admission that we were transacting business.

[406] The phrase, transacting business, is one in my mind that is a general conclusion from a series of activities, and whether or not the activity constitutes the transaction of business is something that I think belongs to the Court, if there is any doubt about the subject. So we didn't decide the matter adversely to ourselves but decided to put the plaintiff to his proof, if he intended to do that at a later date when it became important to take a position.

Q. Well, did you ever put the plaintiff to its proof with respect to those defenses? A. No, never.

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[407] Q. Mr. Bertero, I have handed you two certain papers, respecting the corporate structure of National Theatres Corporation, one in the period between 1932 and 1935 and the other from 1935 to the present time, and I ask you can you [407a] examine those two papers and state whether or not they correctly show the corporate structure of the company in the respects indicated therein? [408] A. Both charts appear correct, but I might say in regard to the chart covering the period from January, 1930 to February, 1935, there was the interposition of the trustees of bankruptcy for certain periods, but otherwise the representations are correct representations of the situation during that period.

Mr. Pride: I offer them in evidence.

Mr. Kostelanetz: May I see them, please?

Could I, your Honor, just one preliminary question on this?

The Court: Yes, surely.

Mr. Kostelanetz: In addition to the National Agency Corporation listed here, and then the Fox West Coast

Defendant's Witness, John B. Bertero, Cross

Agency Corporation and the so-called regional agency corporations were there in addition other agency corporations, local agency corporations?

The Witness: No, Mr. Kostelanetz, there was one local agency corporation in each so-called division, one in California, one in the Pacific Northwest, a local agency or servicing company in the Denver area, one in Kansas City and one in Milwaukee: Then there was the top or parent servicing or agency corporation, National Theatres Amusement Company. So, you only have the five plus the parent or the top.

[409] Mr. Kostelanetz: I see.

No objection.

(Charts received in evidence as Defendant's Exhibit P, as of this date.)

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Cross Examination by Mr. Spanos:

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[410] Q. Now, as of that date, on that chart, September 28, 1935, Mr. Bertero, the Twentieth Century Fox Film Corporation, so far as you know, owned what interest in the defendant in this case, National Theatres Corporation? A. Forty-two per cent of the stock, as I recall it.

Q. And the defendant National Theatres Corporation in this case owned what per cent as of that date in the company listed as the National Agency Corporation or National Theatres Amusement? A. Well, if it were in existence, it owned 100 per cent of the shares; National Theatres Amusement Company was a wholly-owned subsidiary of National Theatres Corporation.

Q. And also National Theatres Corporation, the defendant in this case, owned 100 per cent of the stock of the

five other companies which are listed there as Fox West Coast Theatres, Fox Midwest Theatres, Fox Rocky Mountain and Fox Wisconsin; is that correct?

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[411] A. You are speaking of the chart of September 28, 1935?

Q. Yes, yes. A. You mentioned Fox Rocky Mountain, you mean Fox Intermountain—

Q. Fox Intermountain, I am sorry. A. Well, at that date, National Theatre Corporation owned all the shares of Fox West Coast Theatres Corporation, all of the shares of Fox Intermountain Theatres, Incorporated, all the shares of Fox Midwest Theatres, Incorporated, all the shares of Fox Wisconsin Theatres, Incorporated, I believe the name is, and approximately half the shares of Evergreen State Amusement Corporation which operated principally in the states of Washington and Oregon.

Q. Now, Mr. Bertero, did any of those five companies that you have just named, other than Fox West Coast Theatres, own or operate or have any interest in any theatres in the State of California as of that chart, as far as you know? A. I think that all the theatre interests of National in California were owned in or through Fox West Coast Theatres Corporation.

Q. Now, Mr. Bertero, can you tell us what relationship, if any, existed between the company which has been identified [412] in this case as National Agency and later National Theatres Amusement Company, and the Fox West Coast Theatres Company that you have on that chart during the period from 1935 down to the date of the filing of this complaint? A. Well, National Theatres Amusement Company has always been 100 per cent owned by National Theatres Corporation; Fox West Coast Theatres Corporation has always been a wholly-owned subsidiary—and what other company did you mention?

Defendant's Witness, John B. Bertero, Cross

Q. I wanted the relationship between Fox West Coast Theatres and National Theatres Amusement, if any, during this period that I pointed out. A. I stated the fact.

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[413] Q. Now, Mr. Bertero, what relationship existed between Fox West Coast Agency Corporation and the National Theatres Amusement or the National Agency Corporation? A. Well, I thought I heard Mr. Pride say that there is in evidence a contract between Fox West Coast Agency Corporation and National Theatres Amusement Company; in addition, each of them are directly or indirectly wholly owned subsidiaries of National Theatres Corporation.

Q. Now, Mr. Bertero, I show you what has been previously introduced in evidence in this case as Plaintiffs' Exhibit 20, and it appears to be an assignment of the Skouras contract [414] dated December 2, 1935.

I want to call to your attention the use of the phrase "serviced" companies in that exhibit. A. Yes, I see the reference, Mr. Spanos.

Q. Now, Mr. Bertero, which companies in California are encompassed by that term, if you know? A. Every subsidiary of Fox West Coast Theatres Corporation, controlled subsidiary and wholly-owned subsidiary, are serviced by Fox West Coast Agency Corporation, and indirectly, through the contract between Fox West Coast Agency Corporation, are entitled to the services of National Theatres Amusement Company, Incorporated.

Q. Now, you say that every company which was serviced by Fox West Coast Agency Corporation is included in the term "serviced companies"? Is that correct? A. I would interpret this to mean that every company in California which is a subsidiary, at least a controlled subsidiary of Fox West Coast Theatres Corporation, is the serviced company.

Defendant's Witness, John B. Bertero, Cross

Q. And was there a contract, Mr. Bertero, between those companies and the Fox West Coast Service or the Fox West Coast Agency Corporation? A. Yes.

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[415] Q. Is it fair to say, Mr. Bertero, that any services which were rendered to any companies in which the defendant National Theatres Corporation had an interest and which operated theatres in California, were rendered by the Fox West Coast Agency Corporation after 1935 pursuant to a contract between Fox West Coast Agency and the various companies operating those theatres in California. That is so far as you know?

Mr. Pride: I object to the form of the question, your Honor, the agreement speaks for itself, that is in so far as he is asking what it did pursuant to the agreement.

The Court: Overruled.

A. I can state the fact, Mr. Spanos, for example, that Fox West Coast Agency Corporation agreed to, under the contract which you have reference to, to provide for the so-called serviced companies, subsidiaries of Fox West Coast Theatres Corporation, accounting services, kept the books of account of the serviced companies, it maintained a purchasing and [416] maintenance department which performed services for the serviced theatres, it had bookers which booked pictures into the theatres of the serviced companies, and it did many things of that character, and those things were also called for by the contract; so in the performance of those services, they were being done all under the agency contract or the service contract.

Q. And they were done under the agency or service contract between the theatre operating company and Fox West Coast Agency? A. Well, if you give me a specific fact, well, keeping the books was certainly done under

the contract because the contract obligated Fox West Coast Agency to maintain the books of account for a fee.

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[420] Q. Mr. Bertero, have you examined Mr. Woolams affidavit which was filed in the Jensen case? A. I did at the taking of my deposition, I read it at that time, yes.

Q. And you have not examined it since then? A. No.

Q. Well, I ask you to examine it now.

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Q. Do you have any reason for stating to this Court that any of the factual representations made by Mr. Woolams in his affidavit filed in support of your motion in 1932 are untrue?

[421] Mr. Pride: I object to the form.

The Court: Overruled.

A. Well, I ought to take this paragraph by paragraph and read and state which are true, according to my knowledge, and which I have no knowledge of, and which are untrue which I have knowledge of.

The Court: You may do so.

By Mr. Spanos:

Q. You may do that, if you feel it is necessary. A. If you have a particular allegation we can save time, or otherwise I will have to do that.

Mr. Spanos: Which would your Honor prefer?

The Court: Well, I prefer to save time and not go over things that need not be reviewed in that way.

By Mr. Spanos:

Q. Do you have any reason for stating this to this Court, Mr. Bertero, that Mr. Woolams' allegation set forth

in his affidavit that "At all times hereinafter mentioned and particularly September 26, 1932, and at the time of the alleged service of the summons in the above-entitled action upon affiant, said Wesco Corporation was not qualified to conduct any business in the State of California and did not conduct any business therein"? A. Well, that would require me to put myself back in 1932 and [422] tell you what facts I knew then and what conclusions I should draw from those facts.

I think what you want to do is to ask me the facts of 1932 and then draw your own conclusions.

Q. I am asking you, Mr. Bertero, whether you have any reason today in this court to tell the Court that this allegation contained in the affidavit filed to support a motion in which you were one of the attorneys is untrue? A. Well, give the allegation to me and I will break it down.

According to my understanding now, in 1932 the principal office of Wesco was maintained at 444 West 56th Street. I had knowledge of that fact because I came to New York in June of 1932.

Q. Mr. Bertero, I didn't ask you about that, I asked you about the allegation I directed your attention to. A. I beg your pardon.

Q. The second paragraph. A. "That during all the time the only other office maintained by said Wesco Corporation for the contracting of business"—is that it—"is and was maintained in the State of Delaware."

Q. Mr. Bertero, I read an allegation at your request, and I am asking you if there is anything in the allegation which I read— A. Am I reading the right allegation?

[423] The Court: No.

The Witness: Then I have lost it.

Was it the second paragraph?

Q. It is the second paragraph, yes. A. I have never known or been informed that Wesco was qualified to do

business in the State of California in 1932, and the allegation that it was not qualified to conduct any business in the State of California is, in accordance with my opinion, a correct one; that it did not conduct any business therein, Mr. Woolams was justified in making that statement.

I don't know it as a question of fact.

Q. It is a question of fact? A. Of the activities of Wesco?

Q. Now, Mr. Bertero, do you recall in your deposition that I asked you to read the affidavit of Mr. Woolams, and I asked you this question—

Mr. Young: What page?

Mr. Spanos: Page 57.

By Mr. Spanos:

Q. "Q. I want you to read the affidavit of Mr. Woolams which you filed in 1932 in support of your motion to quash the summons and tell me whether there is any statement of fact in that affidavit which you believe to be inaccurate or untrue?"

[424] Then Mr. Pride made a comment and I made a comment.

Then the witness answered:

"A. I have no basis whatever for stating that any of the factual matters set forth in Mr. Woolams' affidavit are untrue."

Mr. Pride: Would you read the next sentence?

Mr. Spanos: "On many of the matters, I have no recollection or perhaps no knowledge whatever."

By Mr. Spanos:

Q. Now, do you have any knowledge or recollection, Mr. Bertero, that would indicate to you any reason for stating to this Court that Mr. Woolams' statement that "On September 26, 1932, the defendant in this case did

not do business in California," is untrue? A. Mr. Spanos, I have testified to my recollection of what happened in 1932, the activities. If those activities constitute the transaction of business in California in 1932, then Wesco did. If they don't constitute the transaction of business, then Wesco did not do business in the State of California under the venue provisions of the Sherman Act.

Q. Do you recall, Mr. Bertero, whether at the time that you filed your motion— A. Mr. Spanos, now I have no recollection, and when you say "you," do you mean the three attorneys or one of us or whoever [425] handled the matter?

Q. You signed it, didn't you, Mr. Bertero? A. Yes, yes.

Q. At the time that you signed your moving papers, attached to which was this affidavit, did you know any reason why the statement that "Wesco did no business in California" was untrue? A. Did I know that it was untrue?

Q. Yes, did you have any reason for knowing that statement was untrue? A. I have no recollection of my state of mind in 1932, and I have very grave doubts that I had any knowledge of this matter other than at the request of one of my seniors to sign and become counsel of record in the case. The matter is completely out of mind, I have no recollection of it.

Q. No recollection one way or the other? A. I would have been the least qualified of the attorneys in 1932, in view of my age and seniority in the company, to pass on the question whether or not Wesco was qualified to do business or was transacting business in the State of California.

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[427] Q. Now, Mr. Bertero, during the period from 1930 to 1952, your office, I believe you testified, was at 1609 West Washington Boulevard? A. That is correct.

Defendant's Witness, John B. Bertero, Cross

Q. In Los Angeles? A. Yes.

Q. Now, during that period, did you ever see a sign on those premises which indicated that any part of those premises housed any entity or anybody working for an entity known as National Theatres Corporation? A. Down to what year, Mr. Spanos?

Q. 1952. A. No, I never did.

Q. From 1930 down to 1952, while you were working at 1609 West Washington Boulevard, did you ever see a sign on those premises which stated that in those premises there was space occupied by an entity or a person working for an entity known as the National Agency Corporation or the National Theatre Amusement Corporation? A. No, I did not.

Q. During the period from 1930 to 1952, did the National [428] Theatres Corporation, the defendant in this case, so far as you know, have any telephone in the State of California? A. You mean a listed telephone?

Q. Yes. A. Not to my knowledge.

Q. During the period from 1930 to 1952, did the company which has been identified as the National Agency Corporation or the National Theatres Amusement Company have any telephone in California? A. I have no recollection on that, I don't think so.

Q. Now, during the period from 1930 to 1952, Mr. Bertero, who was the general counsel for the defendant National Theatres Corporation, if you know? A. The general counsel in New York, Dwight, Royall, Harris, Koegel & Caskey.

* * * * * * *

[430] Q. Mr. Bertero, before the recess I had directed your attention to certain statements made in the affidavit of L. A. Woolums and you answered as to some of those statements.

I want to call your attention to some more statements.

The statement appearing at the top of page 2 of that affidavit, referring to the time of the alleged service of summons, "and for many months immediately prior thereto and particularly on the said 26th day of September, 1932," those statements appearing on page 1 referring to the time of those statements, it says, top of page 2:

"and that during said times said WESCO Corporation never had and does not have an office of any kind in the State of California."

Now, do you have any reason, Mr. Bertero, for telling the Court today that that statement of fact by Mr. Woolams in his affidavit in 1932 was untrue? A. So far as I know at that time National Theatres did not have what we could—may be described as an official office except as the office accompanied the person of Mr. Skouras [431] or other representative of National Theatres Corporation, it had no office in California to my knowledge.

Q. Mr. Woolams goes on to state, "that during all of said times none of the corporate records, books of account of WESCO Corporation and none of its papers and documents relating to its business were and none now are located in the said State."

Do you have any reason for telling this Court today that any of those statements made by Mr. Woolams in 1932 are untrue? A. So far as—

> Mr. Pride: If your Honor please, I object to the form of the question. "Does Mr. Bertero have any reason for telling you something that he hasn't told you."
>
> The Court: I will overrule the objection.

The Witness: So far as I know, Mr. Spanos, the books of account of National Theatres Corporation at that time were in New York and all its papers were in New York, and I have no recollection that any of its papers or books

of account were in California. Copies may have been, but its official records were in New York as far as I remember.

Q. Mr. Woolams goes on to state "that during all said times WESCO Corporation did not own, does not now own, or [432] use or control, any property, real or personal, in the said State of California."

So far as you have any recollection, Mr. Bertero, is that statement true? A. I have no knowledge on that subject and—at least I had no knowledge in 1932—and I have none now. I have no reason to believe that it is not true.

Q Mr. Bertero, Mr. Woolams goes on to say that during said times it did not have nor does it now have any employee or employees or managing agent or any other person located in the State of California.

Will you tell this Court and jury whether in accord with your recollection that statement of fact is true? A. I wouldn't have known in 1932 of any employees of National Theatres Corporation in California, other than the fact that I did know, I think in 1932 because I believe I learned the fact early, that Mr. Charles P. Skouras and Mr. Spyros P. Skouras had been employed as the co-managers of the theatrical enterprises of National Theatres Corporation throughout the world; and if, in that capacity—then in that capacity—Mr. Skouras would have been employed I do not know. But the contract was assigned to National Amusement as has been pointed out here. I do not know the effect of the contracts.

* * * * * * *

[433] Q. But you did know in 1932 when you signed the pleadings to which this affidavit was attached the facts of Mr. Skouras' employment? A. I am inclined to think I did. At least I may not have seen the contract, but I knew Mr. Charles P. Skouras was a very important per-

son in the operation of the affairs of National Theatres Corporation and that he and his brother, Spyros, had taken over the charge of the operation of the circuit.

Q. So far as you can now recollect, the facts, you knew in 1932 about Mr. Skouras' employment did not cause you to bring the matter to Mr. Buckley's attention—the matter, that is, of this statement—of whether or not this statement in Mr. Woolams' affidavit was factually correct? A. I can't testify on the subject because I have no independent recollection of this case or what transpired in the handling of the case, so I can't testify on the subject. [434] I have no recollection. That is some 23 years ago, Mr. Spanos.

Q. Yes.

Now, Mr. Woolams went on to state in his affidavit which was attached to the motion filed over your signature, that during said times no employee or employees or agent or agents or representative or representatives of said WESCO Corporation transacted or engaged in or did any business in the State of California for or on behalf of said corporations.

According to your recollection, Mr. Bertero, do you have any reason for telling this Court that that statement of Mr. Woolams is incorrect? A. I can only tell you the fact, Mr. Spanos, that as I narrated here previously, Mr. Charles Skouras directed me and Mr. Buckley to go to New York in May of 1932 and participate in the loan negotiations with the Chase National Bank of this city and to follow through in relation to preparation of papers and so forth in the securing of that loan.

Now, if that is an activity of National Theatres Corporation, that is a conclusion to be drawn. I can only state the fact.

Q. Those facts were as well known to you, Mr. Bertero, in 1932 when you signed this pleading as they are today when you are testifying in this courtroom? [435]

Defendant's Witness, John B. Bertero, Cross

A. I certainly knew and always remembered I went to New York for six or seven weeks in 1932 at the direction of Mr. Charles Skouras.

Q. Mr. Woolams goes on to say, "At the said times said corporation did not have nor does it now have any bank account or bank accounts in the State of California."

Do you have any reason to tell the Court that statement is incorrect? A. I have no knowledge on the subject, Mr. Spanos, neither now, nor did I have then, so far as I know.

Q. Now, Mr. Bertero, during the period you were employed by one of the subsidiaries of the defendant with your office at 1609 West Washington Boulevard, did you know during the period 1930 to 1942 of any person who was on the regular pay roll of the defendant in this case in California? A. During that period I had no knowledge of the pay roll of National Theatres Corporation.

Q. During the period from 1930 to 1942, Mr. Bertero, do you know of any person in California who was either a contract employee of the defendant or a person drawing regular compensation for services from the defendant? A. 1930 to 1942?

Q. 1942. A. Well, Mr. Skouras I knew was a contract employee of National Theatres Corporation, and certain [436] features of his contract had been assigned to National Theatres Amusement Corporation.

Also, during that period, in about 1935, Mr. John J. Sullivan, who had been on the pay roll and under contract to Fox West Coast Theatres was put under written contract with National Theatres Corporation, as I recall, and he continued his residence in Los Angeles and—but was either paid—well, I don't know how he was paid. I shouldn't testify.

Q. Isn't it a fact, Mr. Bertero, that the only person in California during the period 1930 to 1942 about whom

you are positive as being either a contract employee of the defendant, National Theatres Corporation, or a person drawing regular compensation for services from the defendant, was Charles P. Skouras? A. Well, I have brought in Mr. Sullivan's name, and his contract will speak for itself. I am under the impression that he had a contract with National Theatres Corporation in 1936 or thereabouts. I am not positive on the subject.

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[437] Q. Now, Mr. Bertero, I will show you what has been marked as Defendant's Exhibit B, the employment contract of Mr. Sullivan for the purpose of refreshing your recollection as to whether or not Mr. Sullivan was a contract employee of the defendant (counsel hands Exhibit B to witness)? A. (Witness examines Exhibit B).

This contract is the second one I had reference to. It is dated December 5, 1935, and is between Mr. John J. Sullivan of Los Angeles, California, and National Agency Corporation, guaranteed by—oh—and also signed by National Theatres Corporation. But at least it is an appendage.

Q. Mr. Bertero, my question was whether or not that document served to refresh your recollection as to whether or not Mr. Sullivan was a contract employee of the defendant or drew regular compensation for services from the defendant during the period 1930 to 1942? A. I stated the parties to the contract, the three parties.

Q. Does it serve to refresh your recollection? [438] A. Why, it is the fact.

Q. It is? A. Not only refreshes my recollection but it is the fact.

Q. And according to your interpretation of this document, Mr. Bertero, you are testifying today it is a fact that Mr. Sullivan was an employee of the defendant during this period? A. My interpretation of that document is that he was employed by National Agency Corpo-

ration and his contract was guaranteed by the terms of the guarantee attached by the National Theatres Corporation.

Q. Who was Mr. Laurence A. Peters, if you know? A. Mr. Peters is presently an assistant secretary of National Theatres, Inc., and he is also assistant secretary of Fox West Coast Theatres Corporation and of all its controlled subsidiaries.

Q. Did he have a connection— A. He is also a lawyer, I should say.

Q. Did he have a connection with the defendant in this case?

Mr. Pride: In what period, please?

Q. During the period 1930 to 1952. A. What do you mean by connection, Mr. Spanos?

Q. Was he employed by the defendant in this case? A. He was on the pay roll and always has been on the pay roll [439] of Fox West Coast Agency Corporation which pays him for all services he performs, including his service as assistant secretary of National Theatres, Inc., and of National Theatres Corporation until its dissolution.

Q. Did he have an office at 1609 West Washington Boulevard? A. It adjoins mine, yes.

Q. Did you see Mr. Peters frequently in the performance of your duties at the office at 1609 West Washington Boulevard? A. Almost daily except when I was out of town.

Q. Almost daily? A. Yes.

Q. Mr. Bertero—

Mr. Pride: Pardon me, Mr. Spanos. Have you fixed the period of his connection or association with the company? I think you asked if at any time during the period 1930 to 1952.

Mr. Spanos: Yes.

Defendant's Witness, John B. Bertero, Cross

Q. Mr. Bertero, can you fix a period during that time as being the only period during that time when he was connected with Fox West Coast Agency or with the defendant? A. Mr. Peters came with the company in about 1944, possibly 1945.

Q. When you say with the company, which company are you [440] talking about? A. Well, I will state the facts and then you conclude.

He was an officer of National Theatres Corporation from about September, 1952, until its dissolution in September, 1953. He has been an officer—assistant secretary—of National Theatres Amusement Company since about September, 1952.

He has been an attorney and assistant secretary for Fox West Coast Theatres Corporation and its controlled subsidiaries; and is also a member of the Board of some of those subsidiaries, and served in that capacity—those capacities—since about 1944.

And he is on the payroll of Fox West Coast Agency Corporation and always has been paid by that company.

Q. Prior to 1942, Mr. Bertero, did Mr. Peters have any connection with the defendant in this case either as an officer or as an employee or as an attorney? A. No, I never knew him until about 1944 when he first came with the company.

Q. Between 1944 and 1952, Mr. Bertero, did he have any connection with the defendant in this case either as an officer or as an employee or as an attorney? A. During the period from 1944 to 1952 he was not an officer of the company, National Theatres Corporation, but he, during [441] that period, did perform substantial legal services as the attorney for National Theatres Corporation in California.

* * * * * * *

Defendant's Witness, John B. Bertero, Cross

[445] Q. Do you recall whether or not Mr. Brooks attempted to serve National through you in the Berman case? A. It all depends on the interpretation of "attempted to serve." The marshal would frequently ask if I would accept service for Twentieth Century Fox and invariably I would tell him to get [445-A] in touch with the firm of Wright, Peeler & Garret who were downtown and who were attorneys for Twentieth Century Fox.

[446] Mr. Bertero, my question was do you recall whether or not the marshal attempted to serve National Theatres, the defendant in this case, through you in the Berman case? A. No.

His return would show what he did. I don't know what he did, I have no recollection of it.

Q. Will you examine the papers before you and see if it refreshes your recollection as to whether or not service was attempted on National by the marshal in that case?

(The witness examined the documents.)

A. These purport to be returns of service of writ, and Mr. John P. Brook, deputy, certified that he has made service of the summons and complaint upon Caliejo Theatre Corporation by service upon me as vice president of that company, which was a wholly-owned subsidiary of Fox West Coast Theatres Corporation—

Q. Mr. Bertero— A. Let me finish my answer, please.

He makes similar certification of service upon me as vice president of Balboa Building Company, a wholly-owned subsidiary of Fox West Coast Theatres Corporation.

He makes similar certification of return of service upon San Diego Theatre Corporation by service upon me as a like officer of that company, a wholly-owned subsidiary.

Defendant's Witness, John B. Bertero, Cross

He makes similar return of service of writ on me as [447] vice president of Fox West Coast Theatres Corporation.

He also makes similar return of service on me as vice president of the Sandorf Theatres Corporation.

In each instance, the return shows that service was made on May 22, 1947.

Then he certifies that "on the 22nd day of May, 1947," he received the writs and after "diligent search," he was unable to find National Theatres Corporation and National Amusement Company "within my said district."

This was filed May 20th, May 29, 1947.

Q. Now, my question, Mr. Bertero, was whether the examination of these papers serves to refresh your recollection as to whether or not in the Berman case you refused to accept service for National? A. I had no authority to accept service for National Theatres Corporation or National Theatres Amusement Company, Incorporated, in as much as I was not an officer of either of those companies in the year 1947, and I was careful never to accept service for any company unless I had been authorized by an official ahead of time to accept the service.

Q. I see.

Mr. Spanos: I would like to have these documents marked and offered in evidence.

(Papers in *Berman versus Twentieth Century-Fox, et al.*, summons and the return of the marshal, received [448] in evidence as Plaintiffs' Exhibit 24, as of this date.)

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[449] Q. Now, Mr. Bertero, aside from these two cases pending in this court, can you tell us any case or any proceeding in which the defendant National Theatres Corporation ever took the position or made a statement that it was doing business in the State of California during

the period 1930 to 1952? A. Well, that is putting it in a reverse approach. Let us put it another way: In every instance—

Q. I prefer you answer my question and then you can put it any way.

The Witness: May I have that read?

The Court: Whether there were any cases other than these two in which the defendant took the position that it was not doing business?

Mr. Spanos: It was doing business.

A. I have no recollection of any cases where National Theatres Corporation made the positive affirmance that it was doing business in the State of California.

Q. Was it the policy of National Theatres to conceal its [450] presence in California? A. By policy, what do you mean, Mr. Spanos?

Q. In your direct examination you made the statement that National Theatres did not want any public record containing an admission that it was doing business in California, and that is what prompted me to ask this question whether or not it was the policy of National to conceal its presence in California? A. No. The policy of National was that all the state franchise taxes were paid in respect to its California operations, and it did not want to become subject to additional franchise taxes that were not properly payable, and therefore it did not hold itself out, National did not hold itself out to my knowledge as doing business in the State of California for the purposes of the State Franchise Tax Act.

* * * * * * *

[455] Q. And is it your testimony today that as far as you can recall during the period from 1942 to 1950, National Theatres was doing business in California? * * * A. No, I testified only to acts. Now, whether those

acts constituted doing business is a matter of law; at least it is the ultimate fact, Mr. Spanos, and I don't care to give any conclusion.

Q. Do you recall, Mr. Bertero, whether Mr. Cox was an employee of the defendant during the period 1942 to 1950? A. When he came to Los Angeles, I think he had just executed a contract of employment with National Theatres Corporation, and that contract was the subject of some kind of an assignment, at least as to certain phases, to National Theatres Amusement Company.

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[460] Q. Now, do you recall verifying the case of Berman against Twentieth Century-Fox? A. No, I don't.

Q. For purposes of refreshing your recollection, I show [461] you what has been—

Well, I will show you this document to refresh your recollection. It is a document, the answer, certified copy of the answer filed by defendants Fox West Coast Theatres, San Diego Theatres Corporation, Sandorf Theatres and others and the National Theatres Amusement Company to plaintiff's amended complaint.

Now, here is the original complaint and the amended complaint. A. I am looking at the answer of defendant Fox West Coast Theatres Corporation and several subsidiaries, San Diego Theatre Corporation, Sandorf Theatres, the Caliejo Theatres, the Balboa Building Company and National Theatres Amusement Company, being an answer to an amended complaint, and I verified that complaint—that answer, the answer as vice president of Fox West Coast Theatres Corporation, one of the answering defendants in the above-entitled action, and I made the verification for and on behalf of the Fox West Coast Theatres Corporation for the reason that the defendant is a corporation and I am an officer.

Q. Now, Mr. Bertero, did you under your oath in that verification state that the answering defendants "had no

information or belief sufficient to permit them to deny that the defendant in this case, National Theatres Corporation, [462] was engaged in the business of exhibiting motion pictures and had an office at 1609 West Washington Boulevard, in Los Angeles"?

Mr. Pride: I object to the form.

Q. That it had no information which they could affirm or deny that statement? A. You may shorten it by pointing out—

Q. Would you look at paragraph 4 of the complaint, both the original and the amended complaint?

It is four (m) in paragraph IV of the answer. A. The paragraph 4 of the answer contains a general statement to the effect that it "admits that the other defendants mentioned in paragraph 4 are corporations engaged in some phase of the motion picture industry, and these answering defendants state that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the averments respecting said other defendants."

Now, your question?

Mr. Spanos: Will you read back my question, Mr. Reporter.

(The previous question was read.)

A. I verified the answer to the amended complaint in which the averment is made that I just read.

Q. And at the time that you made that sworn verification, [463] Mr. Bertero, your office was at 1609 West Washington Boulevard? A. It was, yes.

Q. And that is the same office, the same address that in the complaint was alleged that National Theatres Corporation was officed? A. Yes, that is correct.

Q. And your office was at that same address, yet you state under oath that you did not have sufficient information or belief that would lead you to either affirm or

deny the fact that National Theatres Corporation had an office at that same address, that is the claim that they had an office at that address? A. Isn't that a question of pleading in California, Mr. Spanos?

Q. I don't know, I am asking you a question. A. As I recall, well, first of all the attorney presented it to me for signature; secondly, as I recall, an averment concerning other defendants need not be answered, so that in the preparation of that answer I think the attorney did a work of surplusage. You are not required to admit anything as to averments about other defendants. With a nicety, our attorney should have either disregarded the averment in the amended complaint, or if he did intend to answer it, answer it on the basis that we knew where National was, or ignore the allegation concerning National completely.

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[464] Q. Isn't it a fact, Mr. Bertero, that at the discussion [465] you had with Mr. Johnston where the decision to file these allegations denying the transaction of business in California by National Theatres, and denying that it had an officer or agent in California, and that California was the proper venue for an action against it, that in that conversation, in your discussion, your decision was not to abandon any proper defense that your client National might have? A. I have no independent recollection of what took place at the conference, either. It does stand out in my mind that there was a conference somewhere around 1947, 1948; it possibly could have been in 1946. I went over an answer in an earlier case with Mr. Johnston and we decided to go forth on the basis of the answer as it was filed. I also narrated the fact that I remember a later conference, but I can't place it in point of time. It might have been two or three years later. Then it was decided not to urge that defense at the time when the question was one that had to be decided by us.

Defendant's Witness, John B. Bertero, Cross

Q. Now, in this first conference that you had with Mr. Johnston, did you and Mr. Johnston discuss and consider the effect upon the position of National in this litigation of the various agency contracts and employment contracts that National had, such as the contract with the Skouras brothers? And the contracts between National Theatres Corporation and [466] National Theatres Amusement Company; were those matters considered by you and Mr. Johnston in arriving at your decision at this first conference in 1947? A. I have no recollection, Mr. Spanos, of the conversations, but at some time I acquainted Mr. Johnston, in the course of the numerous litigations, with the background of the company and the contracts.

Q. Isn't it a fact, Mr. Bertero that you made Mr. Johnston aware of these agency contracts and the relationship existing at this first conference which you had with him? A. I may have, but I have no recollection of it, Mr. Spanos.

Q. Well, for the purpose of refreshing your recollection, I would like to call your attention to testimony that you gave beginning with page 137 in your deposition.

(Mr. Spanos then began examining documents.)

The Court: Well, I had hoped when you had asked for the recess that you were going to find these things and move along.

Mr. Spanos: I am reading from page 141, your Honor.

By Mr. Spanos:

Q. Page 141:

"Q. Well, on the question of agency"—

[467] This begins at the bottom of page 140.

"Q. Well, on the question of agency did you tell Mr. Johnston whether or not the defendant National had an agent in the State of California? A. Oh, I am sure we

discussed the question of whether National Theatres Amusement's arrangements with National Theatres Corporation was of a character that might make National Theatres Corporation subject to suit in this district."

Now, does that refresh your recollection, Mr. Bertero, that you had discussed this and considered it with Mr. Johnston?

Mr. Young: Where are you reading?

Mr. Spanos: Page 141, beginning at the bottom of page 140.

Mr. Pride: You are on page 140?

Mr. Spanos: Yes, at the bottom of the page, the question begins at the bottom of page 140, and the answer is on page 141.

A. It is a conclusion of mine as expressed there, and I am inclined to think that Mr. Johnston and I discussed many facets of this litigation, but all I know is that he and I went over the answer and we arrived at a decision.

Q. Well, on your deposition you stated that you were sure [468] you discussed the agency, the contractual relationship between National Agency or National Theatres Amusement and the defendant in this case; do you recall that? A. I testified exactly as is written there.

Q. All right.

Now, Mr. Bertero, did you subsequent to 1947, the time that you have fixed the approximate time for this conversation with Mr. Johnston, ever make any further investigation of the facts as to whether or not the defendant in this case was doing business in California or had an agent in California or had an office in California? A. I think I knew pretty well the facts, Mr. Spanos. The problem was what conclusion should be drawn from the facts as known.

Defendant's Witness, John B. Bertero, Cross

Q. In other words, you did not know any more facts after 1947 than you did at the time you had this conference with Mr. Johnston in 1947? A. I don't think I knew any more facts that existed prior to 1947, but I learned new facts as time ran and passed.

Q. You say you learned new facts? A. Yes, as events occurred, new facts, I learned those, such as the qualification of National Theatres Corporation in California in 1952; that is what I have in mind.

Q. Between 1947 and 1952, Mr. Bertero, did you learn [469] any new facts that you did not know in 1947 bearing on this question? A. Mr. Spanos, what I am trying to say is that as matters developed in the company after 1947, I learned those matters.

Q. And the only matter you have mentioned is one occurring in 1952, the qualification to do business.

Now, up until 1952, Mr. Bertero, aside from this new fact, was there any fact that came to your attention over and above that which you knew in 1947 when you discussed the matter with Mr. Johnston? A. Our operation continued the same, Mr. Spanos. Mr. Skouras was still a co-manager of National from 1947 until the date of his death; he maintained his office in Los Angeles —the facts were virtually static in those respects.

I don't quite understand what you have in mind; maybe I have missed it.

Q. You state the facts remained the same, you answered the question. A. Yes, the operation of National and the operation of the circuit in Los Angeles had remained the same.

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[470] Q. Did there come a time, Mr. Bertero, when you had a subsequent discussion with Mr. Johnston; isn't that correct? A. That is right, I remember a conference with Mr. Johnston.

Defendant's Witness, John B. Bertero, Cross

Q. And can you fix the time of this second conference? A. No. I remember the second one, but I can only fix it in this respect: It became important to Mr. Johnston to know the wishes of his client, that is as to whether or not they wanted to litigate the issue whether or not National was transacting business in the State of California, and at that conference it was decided not to litigate the issue, and that is the only reason I remember the conference.

Q. Can you fix the date of the conference in relation to the decision in the Sturdivant case? A. I tried to, I am not sure that I can. It seems to me that it was two or three years which had elapsed after the first conference—well, the conference relates to a case on trial in which National, as a result of the conference, appeared and defended.

Now, I can't place that case.. If you can teli me that case and the date of trial, I will tell you somewhat the period when the conference took place.

[471] Q. You say the only way you can fix the date of this second conference is in relation to a case in California in which National appeared and defended on this issue? A. Not defended on the issue, where we had decided not to.

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Q. Did you ever notify counsel on the other side of any of these cases, Mr. Bertero, of your decision not to litigate the issue? A. Mr. Spanos, because of the fact it appeared I would be a witness in each of these actions, I did not become counsel for the company. We had separate counsel, and I did not communicate so far as I can recall with opposing counsel.

Q. Do you know whether or not counsel for National Theatres Corporation ever advised opposing counsel in any of these cases of their decision not to litigate this issue? A. I don't know what transpired in the courtroom

or by [472] stipulation by counsel; I only kept abreast of the highlights of the case as it affected the clients.

Q. Now, so far as you know, no communication was made to opposing counsel that this issue would not be litigated? A. I have no knowledge whatever on this subject, Mr. Spanos.

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Q. Now, has any document ever been filed, Mr. Bertero, waiving this defense in any of these cases, so far as you know? A. I don't know, Mr. Spanos.

Q. Did you consider these defenses when you decided to urge them, Mr. Bertero, as purely formal or "boiler plate defenses," is that the way you have described them, as purely formal and "boiler plate defenses"? A. As I remember the answers, Mr. Johnston would plead the Statute of Limitations, the one-year statute and the three-year statute, and also plead the same denial of the transaction of business within the State of California, and so far as my memory is concerned, that type of answer was filed in the cases coming afterwards.

[473] Q. Haven't you referred to it as boiler plate? A. I may have.

Q. This case. A. I make no point that I didn't. It would be a stock answer, if you want to put it that way, but they would be responsive to the plaintiffs' pleadings.

What I meant was, if I used the expression it was a fairly uniform type of answer on that issue.

Q. Now, you referred in your direct testimony to the fact that in the James case the defendant appeared and defended and did not press this defense, is that correct? A. I understand—it is my recollection that National Theatres Corporation was a defendant in the James case and that among the ten or twelve defendants—and that the jury I know brought in a verdict in favor of the plaintiff for $1,000, which was trebled, and National

Theatres, according to my recollection, was a defendant. The judgment was obtained against that corporation.

Q. And when was that decision? A. Oh, that trial was held in—from about June to August, in Los Angeles, of this year.

Q. Of this year? A. Yes, but it was an old case. You named it here during the course of calling off the roster of old cases.

Q. Mr. Bertero, do you recall whether or not it was in [474] connection with the Fanchon & Marco case—the trial of the Fanchon & Marco case in California, when for the first time any waiver of this defense was made by the defendant? A. I am inclined to think it was, Mr. Spanos, but I would have to see the file on the case.

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Q. Mr. Bertero, did you have anything to do with the preparation of the answer in the case of *Cinematografico versus National Theatres and others?* A. I have no independent recollection of participating in the drafting of the answer, but it would be my practice if time permitted or I was in town or not away from the office to inform [475] myself of the contents of the answer.

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[476] Q. Now, is it a fact, Mr. Bertero, that as of the date of that answer the defendant, Twentieth Century-Fox, owned all of the stock of the defendant, National? A. In 1949 Twentieth Century Fox did own all the stock of National.

Q. And that the defendant, National, owned all the stock of the defendant, National Theatres Amusement Company, Inc.? A. That is correct.

Q. And is the fact that said corporations are separate entities—was it a fact on that date? A. Indeed it was.

I should say they are separately incorporated. They are two distinct corporations, each with its own Board of Directors, each with its own officers, so they are separate entities.

Defendant's Witness, John B. Bertero, Cross

Q. Was it a fact that on that date, as set forth in the answer, said corporations were operated as said entities? A. It is a fact.

Q. And is it a fact, as set forth in that answer, none of the said corporations is "an instrumentality" of the other? A. To the extent that National Theatres Amusement Company, [477] Inc., had a contract with National Theatres Corporation to do considerable—perform considerable services for it and was an agent, it might also be viewed as an instrumentality. I don't know quite what the word "an instrumentality" means. It is a quote, apparently, from the answer or from the use of the word in the plaintiffs' complaint. I don't know how the plaintiff used it. It is put in quotes in the answer.

Q. Yes. Was it a fact on that date, Mr. Bertero, that none of said corporations engages in the business of the other? A. I think that is a correct statement.

Q. Or of any other corporation? A. It depends on the interpretation put on the words.

National Theatres Amusement Company was purely a servicing corporation, performing services for all the subsidiaries of National Theatres Corporation; National Theatres Corporation confined its activities to other matters. So it could be that, as you say, one is doing one thing and the other another and they are not engaging in the business of each other.

Q. Those facts were known to you in 1949 that you have just cited? A. Yes.

Q. And they were known to your general counsel in 1949, [478] so far as you know? A. Well, I think they were pretty well acquainted with the operation of National.

Mr. Spanos: Under the subpoena *duces tecum* we asked for all papers and correspondence relating to qualification for doing business in the State of California.

Defendant's Witness, John B. Bertero, Cross

Mr. Pride: I believe the record will show here that your Honor ruled, in pretrial proceedings, that the qualification papers in the State of California which qualification occurred after the institution of this action, were not appropriate subject for inquiry by the plaintiffs at the time.

Mr. Kostelanetz: If your Honor please, that may be so in an examination before trial, but this is the trial itself.

The Court: No, it is not the trial itself. On your motion which you made this is a trial on the issue of the statute of limitations.

Mr. Kostelanetz: Yes, your Honor.

The Court: It is not a trial on the main issue.

Mr. Kostelanetz: What I mean to say was we have these various discovery proceedings going on in this Court in relation to this hearing on the trial on the [479] issue of the statute of limitations. At that time your Honor ruled on pretrial discovery that we should not have the application to do business in California and all the documents connected with doing business in California, opinions and so on, I presume on the basis that was urged by counsel, to wit, that they qualified to do business in California after service of the summons in this action.

However, as your Honor knows the application necessarily—I mean I presume all of us know as lawyers—that applications necessarily have a great deal of description of the prior activities of a corporation, since that is the very thing that the state is interested in; and it is that prior activity, your Honor, which is reflected in these documents which we sought under this trial subpoena. As I say, they never moved to vacate the subpoena and that is why we think we ought to have them.

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Defendant's Witness, John B. Bertero, Cross

[480] Mr. Kostelanetz: If your Honor please, in relation to our request for what I referred to as the California documents and memoranda concerning doing business in California and so on, the subpoena *duces tecum* is not a part of the record and I wonder if I may state the numbers or the items which were called for in the subpoena—dictate them to the reporter, your Honor, or—

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[486] Q. Now, Mr. Bertero, do you know the pay roll of the company on which Mr. Epsteen was? A. Was on?

Q. Yes, what company paid him his salary? A. According to my recollection he was on the salary of Fox West Coast Service Corporation until about 1935, late 1935, and then on the pay roll of Fox West Coast Agency Corporation which succeeded to the functions of the service corporation; [487] and in 1942, he was transferred to the pay roll of National Theatres Amusement Company.

Q. In 1942? A. Yes, that is my knowledge.

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[488] Q. During the period from 193_ to 1942, how many companies, subsidiaries or affiliates was Mr. Charles P. Skouras president of? A. The Fox West Coast Theatres Corporation—we had in 1932 around 65 or 70 corporations and later that grew to about 100—some of those being real estate companies and companies of different activities other than operating theatres. And I would guess that in Los Angeles he might have been the president of at least 100 subsidiary companies whose operations were of various character, some theatre operating companies, real estate companies, and so on.

Q. During the daily routine of Mr. Skouras at the office at 1609 West Washington Boulevard he performed services for all those companies at one time or another?

Defendant's Witness, John B. Bertero, Cross

A. He discharged his duties under his contract and also as officer of those various companies, yes.

Q. And there were times when he would be acting for Fox West Coast Theatres as distinguished from any other companies [489] with which he was connected? A. Clearly when he sat as chairman of the board for each, he was acting for that company.

Q. There were other times when he was acting in his capacity as president of Fox West Coast Agency Corporation as distinguished from other companies? A. You could say at certain times his particular activity could be characterized as being agent for a certain company with a problem. Other times you have difficulty.

Q. There were times during the period 1932 to 1942, when Charles P. Skouras left the State of California, is that correct? A. From 1932 to 1942?

Q. 1932 to 1942. A. He traveled frequently to visit the properties on circuit, yes, and to come to New York on matters he handled here.

Q. On some of those visits he would be gone for as long as a month, isn't that correct, and longer? A. Some of his visits were fast and some a month or two, depending on the subject matter.

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[490] Q. Do you know of anyone, Mr. Bertero, other than Mr. Skouras himself—Mr. Charles P. Skouras that is—that can tell how much time during the period 1932 to 1942 Mr. Skouras was in California, how much of that time he was not there, on the business of National Theatres?

Mr. Pride: I submit that is—

The Court: If the witness can answer a question of that sort he may.

Defendant's Witness, John B. Bertero, Cross

The Witness: It would be impossible to allocate Mr. Skouras' time. He would have a telephone call involving the Midland Theatre of Coffeyville, Kansas, and then he would write a letter to our Australian managing director telling him he hoped to get down there or perhaps telling him he ought to come up. That would take ten or fifteen minutes on the Australian end of it, and then he might call Portland, Oregon. It is humanly impossible to allocate Mr. Skouras' time by the company for which he operated.

* * * * * * *

[491] Mr. Kostelanetz: The items which are requested or demanded in the subpoena *duces tecum* served on National Theatres Corporation and which we construe as relating to documents relating to the issue of National Theatres Corporation doing business in the State of California are set forth in the following demands in the subpoena.

Mr. Pride: Which relate to the qualification of National Theatres in California in 1952.

Mr. Kostelanetz: Our position is that we are not construing the subpoena *duces tecum*. The subpoena *duces tecum* speaks for itself and what we want is stated in Item 2 as follows:

"2. Each and every document or copy thereof, submitted to either the State of New York or any agency thereof, and the State of California or any agency thereof, by National Theatres Corporation or anyone on its behalf, relating to the said corporation's authorization to do business in both states, including, but not limited to all correspondence, affidavits, forms and memoranda submitted as aforesaid."

In Item 3 as follows:

"3. Any and all correspondence received by National Theatres Corporation or anyone on its [492] behalf, from the State of New York or any agency thereof, and the State of California or any agency thereof, relating to said corporation's authorization to do business in the State of New York or the State of California."

In Item 4 as follows:

"4. Any and all cancelled checks and statements reflecting amounts paid by National Theatres Corporation or anyone on its behalf, to the State of New York or any agency thereof, and the State of California or any agency thereof, in connection with said corporation's authorization to do business in the State of New York and the State of California."

In Item 6:

"6. Any and all memoranda or other writing reflecting the position of National Theatres Corporation, or the position of the State of New York or any agency thereof, and the State of California or any agency thereof, regarding payment of any New York State tax and any California tax."

And in Item 19:

"19. Any and all memoranda or other writing containing legal opinions relating to the [493] doing and/or transacting of business of National Theatres Corporation in the State of New York and the State of California."

Mr. Pride: The defendant is taking the position that, with respect to all items dealing with the qualification of the defendant in California, that you have a period subsequent to the institution of the action and that pursuant to the ruling of

Judge Galston prior to the trial and at the trial, they are improperly called for by this subpoena and are not produced for that reason.

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[495] Mr. Kostelanetz: If your Honor please, we subpoenaed under trial subpoena certain documents, to wit, papers of the defendant in relation to an application to do business in California, in relation to such correspondence, in relation to forms and memoranda and positions of National Theatres with regard to doing business in California, copies of legal opinions and such that it may have, all with regard to doing business in California.

We think that this being a trial subpoena and a trial that we should be permitted to have those papers and, to the extent they are relevant and material, offer them, your Honor.

The Court: I do not change my decision.

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[504] Q. Haven't you testified, page 146 of your deposition, Mr. Bertero, that so far as you can recall, National Theatres Corporation has never done anything to waive this defense in any litigation?

The Court: Are you reading the question?

Mr. Spanos: I will read from the question.

Q. "Q. I am asking you, Mr. Bertero, if, after any one of these cases in which you have pleaded this defense, [505] there has been a statement made by the attorneys to the Court in court, either orally or by a written document, which waived the defense? A. I wouldn't know.

"Q. You know of no such case where that has been done? A. I think I would be acquainted with any case where the defense was raised, and Mr. Johnston and I agreed the defense would not be pressed. We never

agreed to waive it in writing, as far as I know, but he was authorized and we agreed the defense would not be urged upon the Court and that would be an issue, where if I figured to press the defense, it was not urged upon the Court.

"Q. Was it ever waived formally? A. I don't remember ever seeing a document in which it was waived in writing.

"Q. Do you remember whether it was waived orally?

"Mr. Pollack: In court?

"The Witness: No."

Mr. Pride: Will you please read on.

Q. "A. There are many occasions when necessary matters came up in court where I am not present, and I would have no knowledge of what transpired in court."

Now, Mr. Bertero, can you tell us what basis you had, [506] if any, for your testimony in this court that National Theatres Corporation, through its counsel, in the James case, waived this defense? A. I think we are into semantics. The word "waived" can mean the failure of counsel to introduce evidence in respect of one of four defenses. It can be inactivity.

If you are using the word "waived" as meaning in writing to solemnly say I waive the defense, I don't recall ever having seen such a document.

Q. Now, the James case was tried in 1955, just last summer, and do you recall when it was that National Theatres Corporation, the defendant in this case, qualified to do business in California? A. It qualified in September of 1952.

Q. Under that qualification there would not have been any basis on which you could make this defense in 1955? A. That is a legal question, Mr. Spanos.

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Defendant's Witness, John B. Bertero, Cross

[509] Q. When was the first time, Mr. Bertero, when a decision was reached to qualify the National Theatres Amusement Company to do business in California?

Mr. Pride: Same objection.

[510] The Court: No. I will allow that.

The Witness: The National Theatres Amusement Company was qualified to do business in 1942, according to my recollection, and in that year the accounting records were brought to Los Angeles and Mr. Cox, the vice-president and treasurer of National Theatres Corporation and National Theatres Amusement Company, came to Los Angeles with a staff, or a good part of them, so I assume it was in the year 1942 that that decision was reached. It might have been 1941, but not put into effect until 1942. I don't recall.

Q. Do you know of any reasons for that decision other than the ones you have stated? A. No, other than reasons expressed to me by Mr. Skouras on the desirability of it.

Q. What did he say about it? A. He wanted the treasurer of National Theatres Corporation and the books of account at his elbow so he could more efficiently conduct the operation of National Theatres Corporation and its subsidiaries.

Q. Were there any other reasons? A. He wanted to save expense of the New York office. He thought he could more efficiently conduct the operation. I don't remember any other matters that were referred to.

Q. Do you know of any reasons that existed for that [511] decision in 1942 that did not exist in 1935?

Mr. Pride: Objection.

The Court: Sustained.

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Defendant's Witness, John B. Bertero, Cross

Q. When was it first decided, Mr. Bertero, to qualify the defendant in this case to do business in California?

Mr. Pride: I object, your Honor, although I think you overruled me before.

The Court: I overrule you now.

The Witness: In about early 1952 a plan was developed by Twentieth Century-Fox Film Corporation, owner of all the shares of National Theatres Corporation, to distribute in effect all the shares of National Theatres Corporation to its own stockholders in order to accomplish the divorcement required by the consent judgment. So National Theatres, Inc., was incorporated in 1952 and it acquired, by donation as I previously testified, all the shares of National Theatres Corporation; and at the time of the divorcement it was decided that the home office of National Theatres Corporation should be in Los Angeles, California. The divorcement was effective September 27, 1952, and National Theatres Corporation was qualified in California on or about that date. Maybe a month ahead of time. I don't recall the circumstances at this time.

[512] Q. Was there any other reason for qualifying National Theatres Corporation, for the decision to qualify National Theatres Corporation than the one you have stated? A. No. We moved the home office of National Theatres Corporation from New York to Los Angeles, and it is in Los Angeles today; the New York office was totally discontinued.

Q. Did the California Code requiring corporations doing business in California to qualify in California have anything to do with the decision to move National Theatres to California?

Mr. Pride: I object.

The Court: Sustained.

Defendant's Witness, John B. Bertero, Cross

By Mr. Spanos:

Q. Did you hear that mentioned at all as a reason for the decision?

Mr. Pride: Same objection.
The Court: Sustained.

Q. Mr. Bertero, during the period that you officed at 1609 West Washington Boulevard, did you observe whether or not it was the practice of the various units officing there to operate as separate corporate entities? A. What do you mean by "unit," Mr. Spanos?

Q. Well, the various companies that you have mentioned, Fox West Coast Agency, Fox West Coast Theatres, National [513] Theatres Amusement. A. Yes, those corporations have all maintained their corporate records, their Board of Directors meetings, many meetings, they do maintain separate bank accounts, and in general they preserve their corporate entity.

Q. Now, Mr. Bertero, I want to direct your attention now to the second conversation that you had with Mr. Frank Johnston.

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Q. As I recall your testimony, Mr. Bertero, you could not fix the precise date. You identified the case as the Franchon and Marco case. A. No, Mr. Spanos, I think it was the Franchon and Marco case [514] because that case went to trial, I remember a case went to trial, and the only one I remember after 1947 was the Franchon and Marco case.

Q. Let me show you a printed transcript of the record, Volume 1 of the record in the Franchon and Marco case for purposes of refreshing your recollection as to that matter, and I call your attention to the statements on the last paragraph beginning on page 268.

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Defendant's Witness, John B. Bertero, Cross

Q. Does it refresh your recollection as to the date, Mr. Bertero, at all?

The Court: The date of what?

Mr. Spanos: The date of the trial.

The Court: The date of what?

Mr. Spanos: The date of the trial of the Franchon and Marco case.

The Witness: You can state it. I will accept your statement.

Mr. Spanos: June 12, 1951.

The Witness: I think it was tried in about 1951, [515] yes.

By Mr. Spanos:

Q. Now, can you fix this date in June 1951 as approximately the time, Mr. Bertero, when you arrived at your decision with Mr. Johnston not to urge the defense of not transacting business, not having an office or officer or agent in California? A. No. I can only repeat what I have said so often, namely, at some point in a case it became important for Mr. Johnston to confer with me regarding the position he should take, and at that point the decision was made that he should not urge that defense and litigate the matter.

Now, I think the case was the Franchon and Marco case, but I can't fix it as to the time; it might have been a year before the trial, two months—

Q. Would it have been after the trial of the Franchon and Marco case? A. I don't think that would be the case.

Q. In other words, we can fix the trial of the Franchon and Marco case as the terminal date? A. It would seem logical, yes.

Q. Isn't it a fact, Mr. Bertero, that the basis for the decision that you and Mr. Johnston reached some time

or about this date to abandon this defense was because you felt you [516] couldn't prevail as to it on the merits? A. I can't remember the discussion; I can surmise the basis, but I cannot remember what I told Mr. Johnston or what he told me.

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[517] Q. Was it true, Mr. Bertero, that the basis of the decision you and Mr. Johnston arrived at was, as you testified on page 230 in your deposition, that "We could not prevail upon that defense if it were raised and litigated"? A. I would think that that is very true.

Q. That is very true?

Now, is it also not true, Mr. Bertero, that since Mr. Johnston and you arrived at that decision you have continued to file such defenses? A. That may be what the record shows, I don't recall, but I think Mr. Johnston continued to put in the same form of answer.

[518] Q. And you continued to examine the same form of answer? A. I think I almost invariably saw the answers.

Q. And you continued to permit Mr. Johnston to file the same form of answer, notwithstanding that you knew that it was not true?

Mr. Pride: I object to the question.

The Court: It has already been answered.

Mr. Pride: Sir?

The Court: I sustain the objection.

By Mr. Spanos:

Q. Mr. Bertero, I want to call your attention to what has been filed in this case as Plaintiffs' Exhibit 10, certified copy of the complaint and answer in the case of Levy versus Paramount Pictures, *et al.*, filed April 25th, the complaint being filed April 23, 1951, the answer filed

January 25, 1952, and I want to call your attention particularly to what is set forth on page 4 as the third defense, where it is stated:

"This court has no jurisdiction of defendant National. Defendant National at all times mentioned in the complaint and herein was and is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Delaware [519] and its principal office and principal place of conducting its business and affairs in the City of New York, State of New York. To and including the time of filing this answer said defendant has not had, and does not have, an office in the State of California nor has it engaged in or conducted, nor does it conduct or engage in, any business in the State of California, it has never qualified to do business in the State of California, and it has never consented to be sued in the State of California, or resided, or been found, or been present, or had any agent in the State of California."

Now, Mr. Bertero, is it your testimony today that that allegation was not true when filed? A. Our attorney in Northern California tendered that issue in the answer, that is true.

Q. Will you answer my question, please?

Is it your testimony today that that allegation is not true? A. Do you mean did I testify truly, or what?

Q. Is it your testimony today that the statement made in the third defense set forth in this answer which I have just read to you was not true when filed? A. I would say that in the opinion of the attorney who prepared this answer, and based upon their knowledge of the [520] operations of National Theatres Corporation, they did not conclude that such activity as National conducted in Califor-

nia constituted the transaction of business and that it had no principal place of business in the state: That is my conclusion.

Q. I want you to tell us—

The Court: That isn't an answer to his question.

He wants to know what you have to say about the truth or falsity of the allegations in that answer or denials in the answer.

The Witness: I can state my opinion.

Do you want my opinion or—

By Mr. Spanos:

Q. I want to know whether you can say that the statements contained in that answer are true or untrue, and were true or untrue when filed. A. "This Court has no jurisdiction of National."

That is a legal issue which only the Court could decide, and the attorney here presented the issue to the Court.

That, "defendant National at all times mentioned in the complaint and herein was and is a corporation organized and existing under the laws of the State of Delaware"—[521] Well, it is a Delaware corporation.

Q. That is not a conclusion? A. No, that was a statement of fact.

Then the next allegation:

"To and including the time"—

Q. Wait a minute, what about:

"With its principal place of business in the State of Delaware • • •"

Is that a conclusion or a statement of fact? A. I think that would be a statement of fact, that is that it had a corporate office in the State of Delaware.

Q. Now, "• • • with its principal place of business in the State of Delaware," was that true or false when you filed this answer? A. I didn't file the answer.

Defendant's Witness, John B. Bertero, Cross

Q. You examined the answer, according to your testimony, and according to your testimony, you hired the lawyers. A. Please state my testimony where I ever saw the answer in the Levy case, and if that is of any consequence, I will accept it for purposes of this discussion that I saw it, but I don't know that I did. This is in Northern California.

Q. Will you tell me, Mr. Bertero, whether or not this statement:

"With its principal place of business in the State [522] of Delaware" is true or untrue, or was it true or untrue at the time you filed this answer? A. I would say it is true if it is read in connection with "its principal office and principal place of conducting its business and affairs in the City of New York, State of New York.

In other words, it means to me it had a corporate office in Delaware and its principal place of business was in New York.

Q. You say:

"• • • its principal office and principal place of conducting its business and affairs in the City of New York, State of New York."

Now, is that true, and was it true when the answer was filed? A. I would think so.

Q. And this:

"To and including the time of filing this answer said defendant has not had, and does not have, an office in the State of California."

Now, was that statement true when this answer was filed in 1952? A. It was true, it did not have an office, except as the office attached to a person in the State of California.

[523] Q. Mr. Bertero, did it or did it not have an office in the State of California, without the "except"?

The Court: He can't answer without the exception.

Defendant's Witness, John B. Bertero, Cross

By Mr. Spanos:

Q. You can't say it is true or untrue without making a qualification? A. You define the word "office," and I will answer it categorically.

Q. You didn't make any qualification, the defendant did not make any qualification when this answer was filed by its attorneys?

The Court: That is a different matter.

I thought you were going to pursue the major inquiry of the witness whether those facts alleged in the allegations ~~of the~~ answer are true or false.

By Mr. Spanos:

Q. So as stated in the answer, where the statements contained no qualification, you can't say that it is true?

Mr. Pride: Objected to, your Honor.

The Court: I sustain the objection on the ground that the question has been answered.

By Mr. Spanos:

Q. "• • • nor has it engaged in or conducted, nor does it conduct or engage in, any business in the State of California."

[524] Now, was that statement true or untrue when this answer was filed in 1952? A. It depends upon the interpretation to be placed upon it. I have testified as to the acts performed by National Theatres in California, and if that constitutes doing business, t' en it did business, and the statement to the effect that it has not engaged or conducted business in the state is inaccurate. To me it is a legal conclusion.

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Defendant's Witness, John B. Bertero, Cross

Q. Now, the statement:

"• • • it has never qualified to do business in the State of California," was that true? A. I interpret that to mean that it never filed the qualification papers with the Secretary of State, and I state it is true.

Q. "• • • and it has never consented to be sued in the State of California"? A. I interpret that to mean it never filed qualification papers with the Secretary of State as a statutory agent, and [525] I take that to be a true averment.

Q. "• • • or resided" in the State of California, was that true? A. Those are legal conclusions based upon whatever activity it performed in the state.

Q. "• • • or been found" in the State of California, was that true in 1952? A. If the word "found" means whether Mr. Skouras as co-manager of National in the early years could have been served with process, then it could have been found in California at any time after Mr. Skouras came there.

Q. "• • • or been present" in the State of California, was that true in 1952? A. Well, that is a legal conclusion. Mr. Cox and Mr. Skouras, officers and directors of National, were in California for a considerable period of time.

Q. Was it true or untrue, Mr. Bertero?

The Court: He has answered.

Q. "• • • or had any agent in the State of California," was that true in 1952? A. I interpret that to mean that it doesn't have any statutory agent in the State of California for the service of process, and according to my understanding it is true.

• • • • • • •

[526] Q. Now, Mr. Bertero, I want to hand you a transcript of your deposition and ask you to point out to me any place in the deposition where you refer to any con-

versation with Mr. Cox concerning this tax consideration in connection with the filing of these answers.

Mr. Pride: I object.
The Court: I sustain the objection.

By Mr. Spanos:

Q. Isn't it correct, Mr. Bertero, that in this, the 260—in the 272 pages of your testimony in your deposition you never mentioned tax considerations as a reason for filing these answers? A. My deposition speaks for itself, Mr. Spanos.

Mr. Pride: I object, your Honor.
The Court: I sustain the objection.

[527] By Mr. Spanos:

Q. Mr. Bertero, at the time that you were officed at 1609 West Washington Boulevard from 1947 on, when these answers were being filed, did you or did you not know that under the Federal Rules of Civil Procedure attorneys in cases in the Federal Court had to sign their names to the pleadings which were filed?

Mr. Pride: I object.
The Court: Sustained.

By Mr. Spanos:

Q. And you knew that the attorneys of the defendant in this case would have to subscribe to the answers filed in each case?

Mr. Pride: Same objection.
The Court: Sustained.

Q. And you knew, did you not, Mr. Bertero, that lawyers by subscribing to the said pleadings in effect stated under Rule 11 that to the best of their knowledge, information and belief there is a good ground to support the pleadings?

Defendant's Witness, John B. Bertero, Cross

Mr. Pride: Same objection.

The Court: Sustained.

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[528] Q. Mr. Bertero, there has been handed to me a typewritten conformed copy of what is entitled "Holding Company Service Contract," dated December 2, 1935, between Fox West Coast Theatres Corporation and Fox West Coast Agency Corporation.

I would like you to examine it and see if you can identify it as the form of contract which was employed between those two companies during the period since 1932, since 1935 when Agency came in?

Mr. Young: Would you please read that question?

(Previous question read.)

A. This appears to be the contract of December 2, 1935, or a conformed copy thereof between Fox West Coast Agency Corporation and Fox West Coast Theatres Corporation.

Q. So far as you know, were there any other contracts in effect between those two companies covering the same subject matter? A. When you say covering the same subject matter, what do you mean?

Q. The matter of services rendered to theatres by Fox.

Mr. Pride: I don't know whether this fits with the request or not, but there is this additional paper, apparently being a guarantee of obligation of the Agency Corporation by Fox West Coast Theatres.

[529] Mr. Spanos: We would like to have these marked and offered in evidence.

(Documents received in evidence and respectively marked Plaintiffs' Exhibits 26 and 27, as of this date.)

Defendant's Witness, John B. Bertero, Cross

By Mr. Spanos:

Q. There are no other contracts that you know of besides these two between Fox West Coast Theatres and Fox West Coast Agency? A. Mr. Spanos, the servicing arrangements go something like this: National Theatres Amusement Company, Incorporated, enters into a service contract to perform certain services for National Theatres Corporation; it also agreed to maintain it and provide the staff and services to the other Agency corporations. Then, the local Agency Corporation, such as Fox West Coast Agency Corporation, enters into a service contract with the service company, the operating company, to perform certain services to it.

Now, there you have it simply.

Now, as to the first document you handed me, the agreement under which Fox West Coast Agency Corporation was to provide certain services for the top subsidiary holding company, Fox West Coast Theatres Corporation, that is that document; now, in that second document which is the guarantee by Fox West Coast Theatres Corporation to Fox West Coast Agency Corporation that the latter would not suffer loss by [530] reason of the performance of its contract with all the service companies, and that is what you are missing, you are missing the latter type of contract there.

• • • • • • •

[532] Q. Mr. Bertero, I show you what has been marked Plaintiffs' Exhibit 28, it is a typewritten conformed copy entitled "Guarantee of Standard Service Contract," dated September 19, 1938, between Fox West Coast Theatres Corporation, Fox West Coast Agency Corporation, and I show it to you and ask you if you recognize it to be what it appears to be? A. I recognize it as the type of contract that was entered into between those companies.

Mr. Spanos: I would like to offer this in evidence, your Honor.

Defendant's Witness, John B. Bertero, Cross

By Mr. Spanos:

Q. I show you what has been marked as Plaintiffs' Exhibit 29—

The Court: Why don't you show them all?

[533] By Mr. Spanos:

Q. I show you Exhibits 29, 30, 31, 32, 33, 34, and I ask you if you can identify them as what they show on their face they purport to be? A. I identify them as the contracts that they purport to be.

Mr. Spanos: We offer those in evidence.

(Documents received in evidence respectively as Plaintiffs' Exhibits 28, 29, 30, 31, 32, 33, and 34, inclusive, as of this date.)

• • • • • • •

[1] [2] The Court: Since the briefs were filed in this matter, I have a letter dated February 4th from the attorneys for the plaintiffs; a letter of February 10th from the attorneys for the defendant; and a letter of February 11th from the attorneys for the plaintiffs.

I take it as a result of these letters that you want to reopen the case for correction of minutes, or whatever it is, and that is the purpose of this session.

If either of you care to be heard, you may do so.

• • • • • • •

[5] Mr. Kostelanetz: Yes, your Honor. Thank you for your admonition.

If your Honor please, with regard to my letter of February 4th I would like, if I may, to expand the record in connection with the statements which appear on the pages of the record 163 and 164 concerning the term accrual—

• • • • • • •

Mr. Kostelanetz: If your Honor please, I am sorry I had opened my book of testimony to the wrong page. Your Honor asked on page 163 concerning the accrual of the action. And about the fourth paragraph from the bottom, line 16, Mr. Pride said: It is conceded that in this action the carses of action in the first case [6] accrue.

The Court: He said, "It is conceded in this action that the causes of action in the first case accrue.

Mr. Kostelanetz: And then, for the purposes of brevity, skipping down to line 23, December 8, 1931. And similarly at page 164, Mr. Pride, with my own concurrence, identified the second action as accruing July 4, 1935.

The Court: What line is that? Line 9?

Mr. Kostelanetz: Yes. Line 9 and line 10.

With your Honor's permission, I would like to make a statement which we, with a great deal of care, set forth in our letter of February 4th, and if I can dictate the second paragraph of the letter into the record, I think our position will be clear.

Would your Honor permit me to do that?

The Court: Yes, go ahead.

Mr. Kostelanetz: The term was used—

The Court: Now, why don't you explain what the term is first?

Mr. Kostelanetz: The term (accrual) was used, at least by the plaintiffs, in the sense that the continuing torts complained of culminated on the dates [7] when the plaintiffs lost their theatres; the torts having culminated on that date, the Statute of Limitations would not be a complete defense to the actions unless the full periods specified in the statutes had run after such dates. We believe that our adversary intended to use the term in the same sense. In this connection we respectfully wish to point to *Leonia Amusement Corp. versus Loew's*, 117 F. Supp. 747, 762, where a similar issue to the case

at bar was tried, and the Court fixed the date of the sale or the disposal of the theatre as the date on which the Statute of Limitations began to run. It was obviously only after a consideration of the period of time commencing with that date that the Court could determine whether the Statute of Limitations was a complete defense. The plaintiffs did not intend to convey to the Court the idea that they were waiving any claims for damages resulting from the defendant's overt acts committed prior to the dates on which plaintiffs lost their theatres.

That is what I had in mind, your Honor.

The Court: Well, do you want to say something about what you meant when the term accrued was discussed?

[8] Mr. Pride: I meant exactly what Mr. Kostelanetz says he thought I meant. In other words, that was the date of the accrual of plaintiffs' causes of action for the purpose of the issues before the Court here. As I understand, the plaintiffs do not take issue with that. We are in accord on that.

As I understand the purpose of this letter it was to say that if the plaintiffs were permitted to maintain the action, and if the question of damages on the trial became important, that they wouldn't be precluded from recovering damages prior to the date the causes of action accrued.

So as far as the issues here are concerned, I am sure there is no contrariety between us.

The Court: You agree with what Mr. Kostelanetz has just read into the record?

Mr. Pride: I agree with it in so far as it attempts to deal with the term accrual, and so forth, but I do not purport to pass upon the case he cited, or what was held there, or any of the rest of it.

• • • • • • •

Order Dismissing Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This Court on June 25, 1954, by an order of Judge Rayfiel, having ordered a separate trial of this case on the issue of defendant's defenses that the action was barred by the statutes of limitations of the State of California and of the State of New York, and the case having been tried on that issue on December 12, 13, 14, 15 and 16, 1955, and this Court, on March 28, 1956, having rendered and filed its opinion, findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED that the complaint herein be and the same hereby is dismissed with costs to defendant in the amount of $468.13, and the Clerk of this Court is hereby directed to enter judgment hereon.

Brooklyn, New York, April 16, 1956.

/s/ CLARENCE G. GALSTON,
United States District Judge

Identical Order entered Civil Action No. 12074.

Opinion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Appearances:

Corcoran, Kostelanetz & Gladstone, Esqs., Attorneys for Plaintiffs; Boris Kostelanetz, Esq., Theodore E. Gladstone, Esq., Francis J. Mulderig, Esq., of Counsel.

Dwight, Royall, Harris, Koegel & Caskey, Esqs., Attorneys for Defendant; Frederick W. R. Pride, Esq., Charles F. Young, Esq., Stanley Godofsky, Esq., of Counsel.

GALSTON, D. J.:

Pursuant to an order dated June 25, 1954 of Judge Rayfiel, a separate trial on the issue of the statute of limitations was conducted in two actions brought unde the Clayton Act, 15 U. S. C. A., Section 1 *et seq.*, against the defendant National Theatres Corporation. The actions were tried together. At the time of trial motions were made pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings.

The plaintiffs are California corporations, owning and operating theatres in the City of Los Angeles, California.

The complaints contain substantially identical allegations of conspiracy differing only in order of arrangement of the paragraphs and in the specific details of damage to the particular plaintiff.

It is important to note that in the very first paragraph of the complaint concerning jurisdiction it is alleged:

> "* * * the unlawful acts done in pursuance thereof, have been and were conceived, carried out, made effective and performed in part, within this District of the Court and elsewhere in New York and in Los Angeles, California, and throughout all parts of the United States."

Significant allegations are set forth as to the activities of operating subsidiaries of affiliates of the defendant in California. The defendant contends that the compelling inference must be that defendant, within the meaning of the Clayton Act, transacts business and is "found" within the State of California:

> "Wherever in this complaint it is alleged that any acts were done by any Theatre Operating Subsidiary of National, plaintiff alleges that all of those acts were done at the behest and instigation of National and were caused to be done by National pursuant to the unlawful combination and conspiracy of which National was a member, all as will be more completely set forth below.
> "Unless otherwise specified, reference to National in this complaint is intended to include National and any theatre operating subsidiary or affiliate thereof as the context requires. * * *"
> "National has, at all times mentioned in this complaint and since prior to 1930, controlled certain theatre operating companies which at all times mentioned in this complaint and since prior to 1930 have owned, controlled, leased or operated upwards of five hundred (500) theatres in the states of California, Missouri, Washington, Arizona, Kansas, Illinois, Oregon, Colorado, Utah, New Mexico, Wyoming, Idaho, Montana, Nebraska, Michigan and Wisconsin."

The plaintiffs define their own terms:

"10. *Conspirators.* The term 'Conspirators' whenever used in this complaint is intended to include, but is not necessarily limited to each and any or all of the following: * * * and in addition to them, the defendant National Theatres Corporation, hereinafter referred to as National and the other defendants herein.

"11. *Theatre Operating Subsidiaries of the Conspirators.* The term, 'Theatre Operating Subsidiaries of the Conspirators' is intended to include and designate those subsidiaries and affiliates of each or any or all of the Conspirators hereinbefore designated which own, control, lease, or operate or have any interest in any motion picture theatre or theatres."

With respect to the conspiracy, each complaint alleges:

"Prior to January 1st, 1930, the defendant National, and the other defendants herein and the Major Distributors and certain producing and distributing corporations affiliated with or controlled by or controlling them, entered into an unlawful combination and conspiracy to restrain and to monopolize interstate trade and commerce in motion picture films throughout and in all parts and places of the United States. The members of this unlawful combination and conspiracy have hereinbefore been identified and designated as the Conspirators."

Trade practices were put into effect in California pursuant to the alleged conspiracy, which had as their object discrimination against so-called independent exhibitors, including the plaintiffs, to the advantage of the theatre-operating subsidiaries of the conspirators, includ-

ing the theatre-operating subsidiaries of the defendant National in Los Angeles. Various means of effectuating the discrimination against the plaintiffs in Los Angeles are described, such as block booking, blind buying, uniform runs and clearances, fixing minimum admission prices and entering into joint theatre-operating agreements.

Overt acts of the conspirators in effectuating the conspiracy are charged:

> "In pursuance of said combination and conspiracy the said Conspirators, including as aforesaid the defendant herein, National, and affiliated corporations engaged in the practices and entered into the agreements and committed the acts herein alleged, all of which, unless otherwise stated, have been continuously and periodically done from the time of the formation of said conspiracy to July 20th, 1938, and subsequent thereto."

Certain practices are then described which are alleged to have been put into effect to favor the theatre-operating subsidiaries of National, and to discriminate against independent exhibitors, including plaintiffs in Los Angeles. For example:

> "During all times mentioned in this complaint and since prior to 1930, the Conspirators have excluded independent exhibitors, including the plaintiff, from the business of operating first and/or second run theatres and the business of exhibiting pictures on the first and/or second run in the City of Los Angeles and in other cities of the United States with a population of over 100,000."

In Count Two of each complaint, it is alleged that there was a monopoly and conspiracy to monopolize the exhibition of motion pictures by National and its subsid-

iaries in certain areas, including specifically the State of California and particularly the City of Los Angeles. Means to effect the alleged monopoly are set forth:

> "2. National and National's wholly owned subsidiary, Fox West Coast Theatres, Inc., a California corporation, with principal offices in Los Angeles, California, secured control of approximately Two Hundred and Sixty (260) theatres in the said states of California, Arizona, Nevada and New Mexico, which were organized and grouped into a circuit known as Fox West Coast Theatres, Inc.
>
> • • • • • •
>
> "4. National coerced, induced or persuaded or forced the operators of theatres in said states, including the plaintiff, to cease operating their theatres either so that National or its Theatre Operating Subsidiaries could acquire such theatres or have removed the competition which such theatres in the hands of independent operators offered."

It is conceded that the Bertha cause of action accrued July 4, 1935, the Gumbiner December 8, 1931. It is from those dates that computations must be made as to the running of the statute of limitations.

Both actions were commenced in 1951, which is prior to the effective date of the four-year federal statute of limitations (Section 4B of the Clayton Act, 69 Stat. 283, 15 U. S. C. A., Section 15B), and therefore the applicable statute of limitations is determined by reference to the law of the state in which the action is pending. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390 (1906); *Hoskins Coal & Dry Dock Corp. v. Truax Traer Coal Co.*, 191 Fed. 2d 912 (7th Cir. 1951), cert. den'd 342 U. S. 947 (1952); *Schiffman Bros. v. Texas Co.*, 196 Fed. 2d 695 (7th Cir. 1952).

Opinion

A federal court in applying the state statute of limitations applies the entire statute, including the statutory borrowing provisions relating to causes of action accruing in foreign jurisdictions. *Winkler-Koch Engineering Co. v. Universal Products Co.*, 79 Fed. Supp. 1013 (S. D. N. Y. 1947); *Hansen Packing Co. v. Swift & Co.*, 27 Fed. Supp. 364 (E. D. N. Y. 1939); *Seaboard Terminals Corporation v. Standard Oil Co.*, 24 Fed. Supp. 1018, aff'd 104 Fed. 2d 659 (2d Cir. 1939).

The New York statute, Article II of the Civil Practice Act (2d Ed. Cahill-Parsons 1955) contains a borrowing clause in Section 13:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of either this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply * * *."

Thus, under Section 13, if a cause of action is barred in the state where it arose, it will also be barred in New York against a non-resident, regardless of whether the period of time allowed by the New York statute of limitations has or has not run. *Isenberg v. Ranier*, 145 App. Div. 256 (1st Dept. 1911); *Kirsch v. Lubin*, 131 Misc. 700 (Sp. Ct., N. Y. Co. 1927), aff'd 223 App. Div. 826 (1st Dept. 1928), aff'd 248 N. Y. 645 (1928); see Report of New York Law Revision Commission, N. Y. Legis. Doc. 1943, No. 65, pages 142, 164.

The applicable California statute of limitations is three years. California Code of Civil Procedure, Section 338-1.

In consequence, the causes of action alleged in the Bertha case were barred as of July 4, 1938, and the Gumbiner Theatrical case as of December 8, 1934, unless the statute was tolled. If it is established that the California statute was not tolled, then nothing more need be considered, since both limiting dates are prior to the institution of *United States v. Paramount, et al.* (S. D. N. Y. Eq. No. 87-273). This action the plaintiffs claim tolled all statutes of limitation.

Basically though, the plaintiffs allege that the California Statute of Limitations was tolled by Section 351 of the California Code of Civil Procedure:

> "Sec. 351. Exceptions, Where Defendant Is Out Of The State. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Accordingly the California courts have construed that section in accordance with its stated purpose: to prevent the running of the statute of limitations against a plaintiff who was unable to present his cause of action in California because the defendant was not amenable to the process of the California courts. See *Chappell v. Thompson*, 21 Cal. App. 136, 131 Pac. 82 (D. C. App. 2d Dist. 1913); and *Schneider v. Schneider*, 82 Cal. App. (2d) 860, 187 P. 2d 459 (D. C. App. 2d Dist. 1947).

Therefore, the question presented is whether the defendant National Theatres was amenable to suit in California under the Anti-Trust Act. This question is in part solved by the Clayton Act, Section 12, 15 U. S. C. 22, which reads as follows:

> "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found."

Thus to determine venue it must be decided whether within the meaning of Section 22 of the Act, National Theatres was an inhabitant of California, could have been found there, or transacted business there. The term "transacted business" in Section 22 has a particular meaning which is independent of other definitions of the term in state and federal courts. See *United States v. Scophony Corporation*, 333 U. S. 795 (1948).

California authorities support the position taken by the defendant. In *Steiner v. Twentieth Century Fox Film Corporation, et al.* (Unreported, No. 12944-P. H. Civil, S. D. of California, Central Division, July 22, 1953), it was held that if

> "National Theatres engaged in the acts constituting the alleged conspiracy since 1935, all of which are alleged to have occurred in the State of California, then it was certainly doing business in the State of California sufficient to make it responsive to process of the courts of California, and this is true whether it was done directly by National Theatres Corporation or acting through its agents, the other members of the alleged conspiracy. Squarely in point is the Ninth Circuit case of *Giusti v. Pyrotechnic Industries*, 156 Fed. 2d 351, cert. denied 329 U. S. 787."*

*Reversed and remanded on other grounds (9th Cir.) March 15, 1956.

Opinion

In *E. B. DeGolia v. Twentieth Century-Fox Film Corporation, et al.* (Unreported, Civil Action No. 32,514, September 9, 1953 and April 12, 1954, D. C. N. D. of Calif., Southern Division), the court reaffirmed the principle enunciated in the *Giusti* case (cited in the *Steiner* case, *supra*) that venue is proper as to all conspirators in the district in which the impact of the conspiracy caused the damage to the plaintiff. See also *Taylor v. Navigazione Libera Triestina*, 95 Fed. 2d 907.

Authorities in other states have held to the same effect. In *Ross-Bart Theatres v. Eagle Lion Films, Inc.* (Unreported, Civil Action No. 1576, Eastern District of Virginia, Norfolk Division, February 17, 1954), the plaintiff there moved to quash process in an anti-trust action and for dismissal of the action for improper venue. In denying the motion the court said:

> "The motion must be denied. Section 12 of the Clayton Act, 15 U. S. C. A. 22, said the Court in *United States v. Scophony Corp.* (1947), 333 U. S. 795, 808, intended that a 'foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating • • • to its headquarters defeat or delay the retribution due.' This conclusion was also the clear implication of *Eastman Co. v. Southern Photo Co.* (1925), 273 U. S. 359, 373. The result is that if the defendant was by itself or through others participating in any business combination or conspiracy in this district in 1948 in such a manner as to violate the anti-trust acts, it was suable here in 1953, no matter its then location. Further, for this purpose it could be reached with process running out of this Court wherever it was an inhabitant or was to be found. • • • the Court holds that the sworn charges of the combination and conspiracy in this

district, and the commission of acts in the district pursuant thereto directly or by coconspirators admittedly present here, sustain venue in the eastern district of Virginia."

To the same effect is *Don George, Inc., v. Paramount Pictures*, 111 Fed. Supp. 458 (W. D. La., 1951). In that case the Court relied on the interpretation given Section 12 of the Clayton Act in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927). See also *Hansen Packing Co. v. Swift & Co.*, 27 Fed. Supp. 364.

In *United States v. National City Lines*, 334 U. S. 573 (1947), the Court said, in discussing the changes enlarging the venue provisions under the original Sherman Act and the Clayton Act:

> "The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries" (p. 583).

So on the basis of the allegations in the complaints, under Section 12 of the Clayton Act, 15 U. S. C. 22, the court sitting in California could have had jurisdiction over the defendant.

In these circumstances the decisions of the California courts compel the conclusion that Section 351 of the California Code is not applicable in the cases at bar, and the statute of limitations was therefore not tolled. The actions were therefore barred as of July 4, 1938, in the Bertha case, and as of December 8, 1934, in the Gumbiner case.

Defendant's motion for judgment on the pleadings under Rule 12c of the Federal Rules of Civil Procedure is granted and the complaints are dismissed.

Opinion

Before proceeding to an alternative method of reaching the same result on the facts as adduced at the trial, the objections made by plaintiff to the inconsistent positions that have been taken by defendant in reference to doing business or transacting business in California may be considered. Plaintiffs urge that since defendant has previously taken the position, in other actions, that it was not doing business in California, defendant should now be precluded or estopped from changing its position.

Under the present rules of Federal Practice, inconsistent defenses are specifically permitted, Rule 8e (2). If this is allowed in the same action, it is difficult to sustain the position that defendant should not be allowed to plead in separate and distinct actions either, one or both defenses.

Moreover the plaintiffs have not shown that in any of the actions in which such inconsistent plea was made it was sustained. In fact, evidence at the trial was to the effect that National, in each instance where the plaintiff did not seek dismissal, appeared and defended the action on the merits. This being so, the cases cited by plaintiffs are not in point. See *Philadelphia, W. & B. R. R. v. Howard*, 13 How 307 (1851); *State Compensation Ins. Fund v. Proctor & Schwartz, Inc.*, 102 Fed. Supp. 451 (E. D. Pa. 1952); *Queenan v. Mays*, 90 Fed. 2d 525 (10th Cir. 1937), cert. den'd 302 U. S. 724; *Chandler Laboratories v. Smith*, 88 Fed. Supp. 583 (E. D. Pa. 1950).

Plaintiffs also rely on a note in 59 H. L. R. 1132 (1946), but at page 1136 the following point is established:

> "• • • the courts do not usually preclude a party who has been inconsistent as to the law rather than as to facts. This result is probably reached on the reasoning that, historically switching one's legal grounds in a suit has never been regarded with the

same disfavor as maintaining inconsistent positions as to the facts. Clark-Code Pleading-1928 (p. 434)."

It cannot be too strongly emphasized that the facts are determinative of the issue whether the defendant was doing business or "found" during the times in question. Certainly there is no statutory act which precludes or estops the defendant from maintaining its present position. Nor indeed has the plaintiff been able to show that an equitable estoppel should be charged against the defendant. It may be observed in this connection that there is no showing by the plaintiffs that the plaintiff was prejudiced by the legal defenses which the defendant may have raised in other actions to which the plaintiffs were not parties. I repeat: the facts themselves are determinative of the issue.

The *Scophony* case (*supra*), makes it clear that "transacting business" must be interpreted in the light of the nature of the activities of the corporation, and that a list of minor matters incident to doing business is not conclusive. Among such items which the Court listed as not being valid criteria were: maintaining an office, warehouse or place of business; owning realty or other physical property; keeping a staff of employees; keeping a telephone or listing, etc.

It was upon the absence of similar incidents of transacting business that plaintiffs here have heavily relied: lack of ownership of real estate, as lessee or tenant; nonpayment of local taxes; not maintaining a staff of employees; location of record books, and not maintaining an office.

However, on the overall consideration of all the facts, including those relating to the nature of National Theatres Corporation as a holding company which took an active part in the affairs of its subsidiaries, it must be

concluded that National transacted business in California during the period in question, and no less certainly could thus be "found" in California.

National was parent and grandparent in an intricate multi-corporate structure, and through that structure engaged in the business of exhibiting motion pictures. Approximately two hundred theatres were located in California. Charles P. Skouras and Spyros Skouras were general managers of National pursuant to contracts dated January 19, 1932 and June 13, 1935, and were present in California transacting business of the corporate structure and of direct interest to National. Charles Skouras actually established his office and resided in Los Angeles. National Theatres guaranteed performance by its subsidiary, National Agency Corporation, of the employment contract of J. J. Sullivan which was to be performed in California. John B. Bertero performed many specific services for National in California. National participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres, from February, 1933 to February, 1935 in the United States District Court for the Southern District of California; and National purchased, in California, the assets of the bankrupt estate at the trustee's sale in Los Angeles.

So as alternative grounds for dismissing the complaint as barred by the California statute of limitations, I find as a matter of fact that within the interpretation given Section 12 of the Clayton Act, 15 U. S. C. 22, in *United States v. Scophony Corp.*, 333 U. S. 795 (1947), and *Eastman Kodak v. Southern Photo Materials Company*, 273 U. S. 359 (1927), National Theatres was transacting business in California.

In the light of the foregoing analysis it is not necessary to this decision to pass upon the effect of the institution of the action of the *United States v. Paramount* on July 20, 1938. By that time the claims of both plaintiffs

herein were barred by the statute of limitations in California. By no stretch of the imagination in such circumstances can it be held that the institution of the anti-trust suit filed by the United States against Paramount and other defendants, including National, can revive the dead issue, despite the provisions of 15 U. S. C. A., Section 16, which reads:

> "• • •
>
> "Wherever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arises under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Nor is it necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years. It is sufficient for that purpose to refer to the findings which will be filed concurrently with this opinion. They are necessarily multiple because of the voluminous record.

It has been said truly that a statute of limitations is a statute of repose. See *Wood v. Carpenter*, 101 U. S. 135, in which it was said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They

> stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

Defendant was amenable to suits in both California and New York, and they should be precluded from maintaining actions sixteen and twenty years respectively after the alleged causes of action accrued. The complaints are dismissed.

Settle orders.

CLARENCE G. GALSTON,
U. S. D. J.

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLES.]

In conformity with my opinion in these cases, I make the following findings of fact and conclusions of law:

Findings of Fact.

1. The plaintiff in each action is a corporation organized and existing under the laws of the State of California.

2. The cause of action alleged by Gumbiner Theatrical Enterprises, Inc., against the defendant accrued on December 8, 1931, in California.

3. The cause of action alleged by Bertha Building Corporation accrued no later than July 4, 1935, in California.

4. Defendant National Theatres Corporation (hereinafter referred to as "National") is a Delaware corporation, incorporated under the name of Wesco Corporation prior to 1930. During all of the periods of time here involved it was engaged in the business of exhibiting motion pictures through theatres which were owned or leased and operated by its direct and indirect wholly-owned subsidiaries. During all of such periods certain of such wholly-owned subsidiaries operated approximately two hundred theatres in the State of California. National was a wholly-owned subsidiary of Twentieth Century-Fox Film Corporation (then known as Fox Film Corporation) from prior to 1930 until November 14, 1934. On this latter date National was reorganized in New York and The Chase National Bank of the City of New York acquired 58 per cent of the stock of the company. In 1943, Twentieth Cen-

tury-Fox re-acquired the bank's interest and National again became a wholly-owned subsidiary of Twentieth Century-Fox.

5. On January 19, 1932, National entered into a written contract employing Spyros P. Skouras, Charles P. Skouras and George P. Skouras as general managers of its entire business and the business of its subsidiaries. Among other things, the contract provided:

> "(3) So far as permitted by law, the Managers shall have full authority to direct, manage and operate all of the business and affairs of Wesco * * * and, insofar as Wesco during the term of this agreement controls the business and affairs of its subsidiary companies, to direct, manage and operate the business and affairs of such subsidiary companies."

Pursuant to this agreement two of the Skouras brothers, Spyros and Charles, entered upon their employment by National at or about the date of said agreement and, in fact, acted as the managers of the entire business of National throughout the country.

6. Pursuant to the agreement of January 19, 1932, Spyros P. Skouras was elected president and a director of National which position he held until November, 1934, when Sidney R. Kent, president of Twentieth Century-Fox, was elected president of National. Spyros P. Skouras was elected executive vice president at that time. His duties and the services performed by him, however, remained the same. Spyros P. Skouras continued as executive vice president and one of the general managers of National until April, 1942, when he succeeded Mr. Kent as president of Twentieth Century-Fox. Thereafter he became Chairman of the Board of National.

7. Pursuant to the contract of January 19, 1932, Charles P. Skouras in about March, 1932, established his office as co-general manager of National at 1609 West Washington Boulevard, Los Angeles, California, such address being that of a building maintained by Fox West Coast Theatres, a wholly-owned subsidiary of National. Mr. Skouras also established his residence in Los Angeles. At or about that time he became an officer and director of all of National's West Coast subsidiaries, and continued as such during all of the periods here involved. In April, 1942, he was elected president and employed as general manager of National. He maintained his office and residence in Los Angeles continuously from March, 1932, until his death in 1954. The office maintained by him in Los Angeles was, in effect, the western office of National.

8. The two Skouras brothers, as general managers of National, were equal in the scope and extent of their authority. From in or about March, 1932, they were in day-to-day communication. Though Charles P. Skouras maintained his office and residence in California, his activities were not confined to the operation of National's affairs in that state; along with his brother and co-general manager, he was active in all phases of National's business throughout the country. He was also an officer and director of many of National's subsidiaries which operated in states other than California.

9. The contract of January 19, 1932, between National and the Skouras brothers was terminated on November 3, 1934. Negotiations for a new contract were then entered into which resulted in an employment contract dated June 13, 1935, whereby National again employed Spyros P. Skouras and Charles P. Skouras as general managers of its entire business for a period ending December 31, 1944. There was no interruption of the managerial and executive

duties of the managers between November 3, 1934 and June 13, 1935, or of the services performed by them. Though the contract provided that National's rights to the services of the managers could be assigned to any service or operating subsidiary of National, the contract also provided that:

> "Notwithstanding any such assignment, the Corporation shall remain unconditionally liable as principal obligor for all obligations to be performed by it hereunder to the extent the same are not fully and finally performed by any such assignee, and the Corporation and the Managers shall retain all their rights hereunder, including without limitation any right to terminate this Agreement or enforce any of the provisions thereof for their own benefit, to the same extent as though no such assignment had taken place."

10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as "Agency." Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business

of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other accounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1935. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

> "It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection • • •."

Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was formed. After the organization of Agency, the fixed salaries were paid by that company pursuant to the as-

signment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National.

13. Throughout the pertinent periods here involved National's business activities in California were substantial and continuous. Among such activities were the following:

(a) Charles P. Skouras continuously resided and maintained his office in California from 1932 until his death in 1954. From his office in California he carried out his duties and functions as one of the co-general managers of National until April, 1942, and thereafter as president and general Manager. Charles P. Skouras was active in all phases of National's business activities throughout the country and carried out his functions as a manager of National's business as a matter of routine in his day to day activities. The performance of his duties and functions as an officer and director of National's subsidiaries in California were pursuant to and required by his contracts as a general manager of National. Such activities were performed mainly in California. Charles P. Skouras was an agent of National within the meaning of Section 4 of the Clayton Act.

(b) Spyros P. Skouras, the other co-general manager of National as well as president until November, 1934, and executive vice president until April, 1942, made frequent and extended business trips to California, from six to eight each year, from 1932 to 1942 to supervise, manage, and carry on National's business in the Far West and particularly in California in conjunction with his brother and co-general manager Charles P. Skouras. When not in California, Spyros P. Skouras was in almost daily com-

munication with Charles P. Skouras with respect to the affairs of National, not only in California but throughout the country.

(c) When in California, Spyros P. Skouras consulted and advised not only with Charles P. Skouras but with others who carried on National's business there. He visited and inspected theatre properties; carried on negotiations for the licensing of motion pictures; and held conferences with personnel employed directly by subsidiaries but who assisted in carrying on the business of National in California. He was accompanied from time to time by other officers of the company who also performed services for National in California. Film buyers usually accompanied Spyros P. Skouras on his trips to California and performed film buying activities there.

(d) J. J. Sullivan was the chief film buyer for National's West Coast subsidiaries. His film buying activities were under the supervision of Spyros P. Skouras. His activities in this respect were for theatres operated by subsidiaries of National in California and elsewhere. Mr. Sullivan at all times was a resident of California and maintained his office at 1609 W. Washington Boulevard in Los Angeles, but spent from four to six months each year in New York in the performance of his work. He signed an employment contract with Agency on December 5, 1935, and National guaranteed performance of the contract. Mr. Sullivan had refused to enter into the contract unless National guaranteed payment. The contract provided that notices should be sent to Mr. Sullivan at 1609 West Washington Boulevard, Los Angeles, California. The contract provided that expenses incurred by Mr. Sullivan outside of Los Angeles were to be reimbursed by Agency. If performance of the contract required Mr. Sullivan to spend more than six months of the year outside of Los Angeles, he had the right to terminate.

(e) John B. Bertero, a member of the California Bar was employed by one of National's subsidiaries in October, 1930, and has continuously been employed in Los Angeles by one of such subsidiaries since that time. Continuously during all periods here involved he has resided in Los Angeles and has maintained his office at 1609 West Washington Boulevard in that city. Mr. Bertero and other attorneys directly employed by National's subsidiaries performed continuous services for National as a matter of routine, as well as when called upon to do so by one of the managers or officers of the company. Part of his function was to cooperate or work with Charles P. Skouras, National's manager. He continuously advised with Mr. Skouras in Los Angeles concerning various problems of National. Among the specific services performed by Mr. Bertero were work for National in Los Angeles in connection with bank loans made to National and its subsidiaries by The Chase National Bank in 1932; work with National's representatives in connection with the bankruptcy of Fox West Coast Theatres and of Pacific Northwest Theatres in 1933-1935; inspection of theatre properties in Montana and Wyoming when National considered realigning its theatre operating divisions about 1937; appearance for Fox West Coast Theatres Corporation and work with National's attorneys in the case of *Tally & Corbar v. Fox Film Corporation, et. al.*, in the United States District Court in Los Angeles in 1935-1936; selecting and advising with attorneys who represented National in litigation in California; and, throughout the entire period, the day to day activities incident to his employment which involved or related directly to the business of National.

(f) National appeared and actively participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres, from February, 1933, to February,

1935, in the United States District Court for the Southern District of California in Los Angeles. National was one of the largest creditors of the bankrupt, and because of the size and importance of its claims had a crew of men and representatives on the ground in California. Spyros P. Skouras and H. C. Cox, officers of National, were active in the proceedings in California. National purchased the assets of the bankrupt at the trustees' sale in Los Angeles on February 2, 1935. Funds for use in purchasing the assets were made available at the Security First National Bank of Los Angeles.

(g) In the action entitled *Tally & Corbar Corporation v. Fox Film Corporation, et al.*, brought in the United States District Court in Los Angeles in 1935, National was named as a defendant together with Fox Film Corporation, one of its parents, and a number of its subsidiaries. The object of the suit was to set aside the Fox West Coast Theatres bankruptcy proceedings. National appeared in and defended the action. National was represented by attorneys from Los Angeles and San Francisco.

(h) National maintained its insurance department in Los Angeles continuously from 1930 to the time of the institution of these actions. The head of that department was Irving Epsteen, a resident, since at least 1930, of Los Angeles. Mr. Epsteen's office was at all times maintained at 1609 West Washington Boulevard in Los Angeles. Mr. Epsteen was on the pay roll of Fox West Coast Service Corporation until 1935, of Fox West Coast Agency Corporation until 1942, and thereafter of Agency, all of which companies were direct or indirect wholly owned subsidiaries of National. During the entire period Mr. Epsteen has placed all the insurance on the properties of National and its subsidiaries, as well as all liability insurance. All negotiations for insurance took place in Los Angeles, California. The contract of December 2,

1935, between Agency and Fox West Coast Agency Corporation contained the following provision with respect to insurance:

> "(b) We (Agency) will advise you as to the placing and renewal of fire, liability and other insurance for your Local, Serviced and Local Holding Companies and, if requested by you, will, to the extent authorized by such Companies, contract for such insurance either by individual policies on separate properties (or risks) or by blanket policies covering all or any part of the properties (or risks) of any one or more of the Operating Companies, Holding Companies or others."

(i) In the period between 1935 and 1939 National retained and paid attorneys in California who represented National and its subsidiaries or National's subsidiaries and the trustees in bankruptcy of Fox West Coast Theatres.

(j) National's agent, Agency, carried on extensive business activities for National and its subsidiaries in California from December, 1935, to the date these actions were filed. Such activities and services were supervisory, advisory and managerial, and were of the nature Agency had agreed to perform in its contracts of December 2, 1935, with National and with Fox West Coast Agency Corporation. In general they represented services and activities which, prior to 1935, had been performed directly by National, its officers and agents.

(k) In a contract dated December 2, 1935, between Agency and Fox West Coast Agency Corporation, Agency agreed to perform substantial services for Fox West Coast Agency Corporation and the other subsidiaries of National with which it had contracts. Included among such services for theatres in California and elsewhere were

the buying and booking of motion picture films, advice with respect to and the placing of insurance, advice with respect to advertising and advertising policies, contract for repairs and the furnishing of supplies and equipment when requested and to render such special services as might be needed. The contract authorized Agency to enter into contracts for and on behalf of Fox West Coast Agency and the California subsidiaries served by it. Agency also agreed to furnish legal and auditing services to Fox West Coast Agency Corporation and the companies serviced by it. National unconditionally guaranteed the payment by Fox West Coast Agency Corporation of its obligations to Agency under this contract.

(l) In the contracts between Fox West Coast Agency Corporation and the theatre operating subsidiaries of Fox West Coast Theatres Corporation it was provided that not only should services be rendered by Fox West Coast Agency Corporation but also by Agency. The contracts specifically provided that the services of Fox West Coast Agency should also include the services of Agency.

(m) While the separate corporate entities of National's subsidiaries were maintained, National, as sole stockholder, participated in the control and operations of its subsidiaries in California during all the periods of time here involved. Its general managers were officers of the more important subsidiaries. National arranged for and participated in the subsidiaries' financing. Its officers and agents engaged in business transactions for such subsidiaries. Such transactions involved contracts directly relating to the operation of theatres in California and elsewhere.

(n) The complaints herein affirmatively allege that National controlled and dominated its subsidiaries. The subsidiaries are alleged to have acted at the behest and in-

stigation of National and the acts alleged to have been done by National are alleged to include those done by its subsidiaries.

14. When these actions were commenced in this court on September 5, 1951, the president and sole stockholder of each of the plaintiff corporations was one H. L. Gumbiner of Los Angeles, California. He verified the complaints in each of these actions, in which verification he declared that the allegations contained in the complaints were true. In said complaints it is alleged that the plaintiffs here, during all pertinent periods of time, were the owners and operators of the Los Angeles and Tower Theatres in Los Angeles.

15. On February 2, 1935, in the United States District Court for the Southern District of California, Central Division, H. L. Gumbiner commenced an action under the anti-trust laws of the United States against Fox Film Corporation (one of the parents of the defendant National), Fox West Coast Theatres Corporation and other subsidiaries of the defendant National, the bankrupt estate of National's subsidiary Fox West Coast Theatres and the trustees in bankruptcy of that company, one of National's general managers, Charles P. Skouras, and others.

15-A. In that case H. L. Gumbiner verified the complaint, wherein he was plaintiff, and alleged that he was the operator of the Tower and Los Angeles Theatres in Los Angeles, California, and that he owned the causes of action sued upon. The Tower and Los Angeles theatres in Los Angeles, California, are the same theatres that the plaintiffs herein alleged that they owned and operated. The causes of action herein asserted are essentially the same as those which H. L. Gumbiner individually asserted in 1935.

Findings of Fact and Conclusions of Law

16. Though National was not specifically named as a defendant in that action, one of its parents, several of its subsidiaries and its co-general manager, Charles P. Skouras, were named as well as several "John Doe" defendants. Skouras was a defendant both individually and as a trustee in bankruptcy of National's wholly-owned subsidiary Fox West Coast Theatres.

16-A. In the complaint filed by Gumbiner it was alleged that Charles P. Skouras had "an office and place of business" in Los Angeles and that he was "the general manager of all of the businesses" of operating the theatres which are referred to in the complaint. Such businesses included the "business" and theatres in California in which National was interested and as to which National had contracted with Skouras to act as general manager.

17. National's Board of Directors directed that Alfred Wright, a Los Angeles lawyer, be retained to represent National's subsidiaries, Skouras individually and the trustees in bankruptcy (whom National had agreed to indemnify against any such claims). Mr. Wright, under the retainer by National, appeared for and represented National's subsidiaries, the trustees in bankruptcy and Charles P. Skouras individually. Through this retention and representation National was in control of the litigation.

18. In addition to the sworn allegations in his complaint that H. L. Gumbiner was the owner and operator of the two theatres involved, and the owner of the causes of action now asserted by the plaintiffs here, Gumbiner held himself out to be the owner and operator of the Tower and Los Angeles theatres. Exhibits introduced at the trial show that H. L. Gumbiner advertised in the Los Angeles Times that the Los Angeles theatre was individually owned and independently operated by him. The defendants in that case had cause to believe and were justified

in believing that H. L. Gumbiner operated the Los Angeles and Tower Theatres and that the causes of action asserted with respect to such theatres were owned by him.

19. On the day that H. L. Gumbiner brought his individual action, namely, February 2, 1935, National was present in the same United States District Court in Los Angeles by its officers and attorneys and on that date purchased the assets of the bankrupt estate of Fox West Coast Theatres from the trustees in bankruptcy.

20. The action brought by H. L. Gumbiner, individually, was compromised and settled. A general release was executed by him and a stipulation of dismissal with prejudice was executed by him and his attorneys on June 3, 1935, and an order of dismissal was entered thereon. As part of the settlement a subsidiary of National leased the Tower Theatre for ten years, effective in July, 1935, at a substantial yearly rental.

20-A. On June 3, 1935, the date when H. L. Gumbiner and his attorneys executed the stipulation of dismissal of the action brought by him individually, H. L. Gumbiner owned all of the stock of the present plaintiff, Gumbiner Theatrical Enterprises, and also owned all of the stock of the present plaintiff, Bertha Building Corporation. On that date H. L. Gumbiner was also the president of both of the present plaintiff corporations.

21. The institution of the present actions by H. L. Gumbiner's wholly-owned corporations, in which he verified each of the complaints is inconsistent with the action brought by H. L. Gumbiner in his own name in 1935, in which he also verified the complaint and asserted that he owned the causes of action sued upon. The representations made by him at that time were relied upon by National to its prejudice. Further, as to the lease which was entered into by a subsidiary of Na-

tional, there was no evidence that any action was ever taken by H. L. Gumbiner or the plaintiff in this case, Bertha Building Corporation, to set aside the lease, nor was there any evidence that any action has ever been taken to set aside the release which he gave or the stipulation and order of dismissal with prejudice which he signed. The two plaintiffs here and H. L. Gumbiner, by their actions and failure to act, caused National to rely to its prejudice upon the validity and binding effect of the lease, the release and dismissal with prejudice of the claims asserted by H. L. Gumbiner.

22. The plaintiffs herein, the wholly-owned corporations of H. L. Gumbiner, were in privity with H. L. Gumbiner with respect to the causes of action asserted by him, and are bound by H. L. Gumbiner's acts and representations.

23. There was no evidence that at the time of the settlement of the action brought by H. L. Gumbiner in 1935, at which time he was the sole stockholder of both plaintiffs here, any reservation was made by him or by either of such corporations of any claim or cause of action against National or any of its subsidiaries.

24. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in an action filed in the Superior Court of the State of California in and for the County of Los Angeles on September 26, 1932, entitled *Jensen & von Herberg v. Wesco Corporation*. National, under its then name of Wesco Corporation, was named as a defendant in that case. It appears from those papers that on October 8, 1932, National made a motion to dismiss the complaint for improper venue and lack of jurisdiction. No decision with respect to that motion was ever rendered. Plaintiff voluntarily withdrew the action and subsequently refiled it, first in Delaware, and

then in the Supreme Court of the State of New York, New York County, on January 4, 1934. There was no evidence that either plaintiff in these cases relied upon any position taken by National in the California proceedings. There was no evidence that plaintiffs ever knew of or were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Jensen & von Herberg* case.

25. In the period between October, 1932, and 1948 there is no evidence that National ever claimed or asserted in any judicial proceeding or otherwise that it was not subject to suit in California (except as described in finding 24). To the contrary, during that period, National appeared and actively participated in the bankruptcy proceedings of Fox West Coast Theatres in 1933-1935. It appeared and defended in the *Tally & Corbar* case in Los Angeles in 1935. It retained counsel and was in charge of the defense in the action instituted by Gumbiner in 1935.

26. Plaintiffs were also permitted to introduce in evidence certain pleadings in cases filed in California during the period from 1948 to 1951 in which National was named as a defendant. In each and all of those thirteen cases National appeared by counsel and filed its answer. In its answers National pleaded as a separate defense that venue and jurisdiction were improper as to it because, in effect, it was not doing business in California. It was established by the evidence and the court finds that such defenses were pleaded in National's answers because of tax considerations. National did not wish to have on record a judicial admission that it was

doing business in California which could be interpreted as an admission that its business there was of such nature as to subject it to California franchise taxes. Its subsidiaries were qualified to do business in California and paid taxes on the business done by them in California, and National maintained that its separate activities there did not constitute such business as to make it liable for additional taxes. No practical anti-trust or financial consequences attached to the assertion of these defenses by National. For in all of these thirteen cases either its parent corporation, Twentieth Century-Fox Film Corporation, or one or more of its most important subsidiaries, or both, were defendants.

27. In none of the thirteen cases was any decision ever rendered with respect to the defense set forth in the answers filed by National. In each instance, National, prior to taking any steps to litigate the issue raised by these defenses, determined to and did abandon the defenses. It was advised that in the opinion of its counsel, such a defense could not be sustained. Neither of the plaintiffs now before this court was a party to any of these thirteen cases. There was no evidence that either plaintiff at any time knew about or in any way relied upon any pleading or representation by National in those cases or that it was in any way deterred from filing a complaint against National in California. No element of estoppel in favor of either plaintiff was created by the answers filed in any of the thirteen cases referred to above.

In view of other findings herein contained, the activities of National in California were such that the Statute of Limitations had run against the plaintiffs in California long before the pleadings in these thirteen actions were filed in 1948 and subsequent thereto.

28. The continuous and substantial business activities of National and its agents in California throughout the periods involved here, and particularly during the period between 1932 to July 20, 1938 (the date when the case of *United States v. Paramount* was filed), were such as to subject it to the jurisdiction and venue of the United States District Court in California under the venue provisions of the anti-trust laws during all of such periods. The presence and continuous business activities of National's wholly-owned subsidiaries in California, the presence and continuous activities of Charles P. Skouras as co-general manager of National, the frequent and extended business visits to California of Spyros P. Skouras, National's other co-general manager and President or Executive Vice President, and the business conducted by him there, the visits of other officers and film buyers to California to conduct business for National there, National's participation in the bankruptcy proceedings of its principal subsidiary, Fox West Coast Theatres, from 1933 to 1935, its retention of California counsel to represent its subsidiaries, the trustees in bankruptcy of Fox West Coast Theatres and Charles P. Skouras individually and its control over and activities in the litigation brought by H. L. Gumbiner in February, 1935, National's appearance in and defense of the case entitled *Tally & Corbar Corporation v. Fox Film Corporation, et al.*, in the California courts from 1935 to 1937, the retention and payment of attorneys for services in various cases in California, the location of its insurance department in California, the business carried on in California for National by J. J. Sullivan, the performance of day to day and special services for National by John B. Bertero and others in California, and the substantial activities of Agency in California constituted the transaction of business there by National to the extent that it could have been sued in California for

three years after the accrual of both causes of action asserted here and prior to the institution of the Paramount case. The claims of both plaintiffs herein are, therefore, barred by the California statute of limitations.

29. National itself had not qualified to do business in California; paid no taxes to the State of California; owned no real estate in California; had no telephone or other office listing in California; had no employees in California, other than Charles P. Skouras, on its own pay roll; paid no rent for any office space used by its officers and agents, and was the lessee of no real estate in California except that it was the guarantor of the lease to the Fox Theatre in San Diego, the sum total and nature of its other activities and those of its agents in California were such that had it been sued in California under the anti-trust laws at any time during the periods involved here, it could not have succeeded in establishing that venue in California was improper or that it was not subject to the jurisdiction of the Federal Courts in California.

30. Spyros P. Skouras as President and a co-general manager of National from February, 1932 to November, 1934, and as Executive Vice-President and a co-general manager from 1934 to April, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. His office was also maintained at that address from 1942-1952, during which time he was Chairman of the Board of Directors of National. During all of these periods Mr. Skouras was also a director of National, and resided in New York.

31. Sidney R. Kent, President of National from November 14, 1934 to March, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. During that period Mr. Kent resided in New York and

was also a director of National. Other officers and directors of National continuously maintained their offices and residences in New York.

32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i. e., from December 5, 1934, to January 3, 1936.

33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y., in space rented from Twentieth Century Fox. All officers of Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the pay roll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

35. In the period between 1932 and 1942 one of Spyros P. Skouras' principal duties was acting as the head of National's film buying department in New York. He and his assistants regularly negotiated for and entered into film licensing agreements with motion picture distribut-

ing companies in New York. Such contracts were entered into for the five or six hundred theatres operated by National's operating and agency subsidiaries. Mr. Skouras negotiated and executed such contracts as agent of the subsidiaries.

36. From 1930 throughout the period here involved, National retained and paid attorneys at law to represent it generally and specially in New York. Its general counsel was a New York firm.

37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $19,350,000 from the Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with the bank in order to borrow money. As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's

indebtedness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

42. National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century-Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation." Prior to 1935 it had used the telephone facilities of Twentieth Century-Fox without a listing and all calls came in through the Twentieth Century-Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century-Fox.

44. National maintained an office at 26 Journal Square, Jersey City, New Jersey, from January 1, 1935, to June, 1936. At that office were located, for a year and a half, its bookkeeping and accounting department, consisting

of seven or eight people, and two officers. During that period the chief operating executives of the company maintained their offices in New York. The opening of the office in New Jersey came about because of tax considerations. Neither Mr. Skouras nor Mr. Kent ever had an office in New Jersey. The personnel of the New Jersey office were required to come to New York to advise and consult with Mr. Skouras and Mr. Kent.

45. The Jersey City office, at which was located National's accounting and bookeeping departments, was closed in June, 1936. Meetings of National's Board of Directors were held for a brief time at that office but after December, 1936, Board meetings in New Jersey were held in the office of the manager of the State Theatre in Jersey City. National had no employees located in Jersey City after June, 1936. Soon after Twentieth Century-Fox re-acquired the Chase National Bank's interest in National and again became the sole stockholder, corporate meetings were again held in New York.

46. The business activities of National in New York throughout the period from 1930 to the date these actions were filed were substantial and continuous. Even during the period when it maintained an office in New Jersey, its main office must be held to have been in New York where its President, Executive Vice-President and other officers were located and where they carried out their functions and duties as officers of the company. The fact that this Jersey City office was sometimes referred to as National's "principal office" or "principal place of business" does not alter the actual facts as to the existence of its office and that of its executives in New York. Throughout the period that the Jersey City office was maintained, National's Board of Directors and Executive Committee met in New York. After June, 1936, National's

only activities in New Jersey were the holding of meetings of its Board of Directors in Jersey City until January, 1944.

47. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in *Hillside Amusement Company vs. Warner Bros. Pictures, Inc., et al.*, an action filed in the United States District Court for the Southern District of New York in February, 1941. National was named as a defendant in that action. It appears from those papers that in March, 1941, National made a motion to dismiss (in the form of an order to show cause) for improper venue and lack of jurisdiction. It was established by the evidence and the court finds that such motion was filed because of tax considerations. No decision with respect to that motion was ever rendered. Upon advise of counsel that venue in New York was proper as to it and that it could not successfully contest the jurisdiction, National withdrew the motion and entered a general appearance. An order was entered dismissing the motion and noting that National had filed a general appearance. National subsequently answered and defended the action.

48. Neither of the plaintiffs in these cases was a party to the *Hillside* case. There was no evidence that any position taken or pleading filed by National in that case was known to or relied upon by either plaintiff in these cases. There was no evidence that plaintiffs were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Hillside* case. Furthermore, in view of the findings herein made, the activities of National in New York were such that the Statute of Limitations of

New York had run against the plaintiff Gumbiner Theatrical Enterprises prior to the filing by National of any papers in the *Hillside* case.

49. There was no evidence that prior to the filing of its motion in the *Hillside* case in 1941, National had ever filed any pleadings or had made any statements or had taken any position to the effect that it was not subject to the jurisdiction of the courts of New York or that it was not amenable to suit in New York. To the contrary, in 1934, in an action entitled *Palmer v. Wesco Corporation*, it had been sued in New York in the Supreme Court, New York County, appeared in the action, defended and eventually settled the case.

50. The court finds that the continuous and substantial business activities of National in New York throughout the periods here involved constituted the transaction of business by National in New York and subjected it to the jurisdiction and venue of the United States District Court in New York within the meaning of the anti-trust laws. With particular reference to the period from 1930 to July 20, 1938, the date when the Paramount case was filed, a period of more than six years after the accrual of the cause of action asserted by Gumbiner Theatrical Enterprises, National transacted business in New York and had agents there within the meaning of the venue provisions of the anti-trust laws. The court finds that the presence, continuous activities and maintenance of offices in New York by National's chief executives, Spyros P. Skouras and Sidney R. Kent, and also by Mr. Skouras as a co-general manager of National; the presence, activities and maintenance of offices in New York by other officers of National; the meetings of National's Board of Directors and Executive Committee in New York; the retention of attorneys to represent it generally and specially; the maintenance of bank accounts; the sub-

stantial loan transactions effected by National and its guarantees of loans to its subsidiaries; the entering into of various contracts in New York; the film buying activities by National on behalf of its subsidiaries; the receipt and payment of dividends in New York; the presence of its parent corporations in New York; and the substantial and continuous business activities of its agent, Agency, in New York constituted transacting business by National during that particular six-year period prior to the institution of the *Paramount* case. The court finds that National could have been sued in New York during that period and that the claim of the plaintiff Gumbiner Theatrical Enterprises is barred by the New York Statute of Limitations. The court further finds that National's activities in New York were such that it could have been sued in New York, under the anti-trust laws, continuously throughout the period here involved.

Conclusions of Law.

1. The Statute of Limitations of California, where the alleged causes of action arose, is three years. California Code of Civil Procedure, Section 338-1.

2. Plaintiffs and defendant concede for the purposes of these cases, and the court concludes that the Statute of Limitations of New York, where these actions were instituted, is six years. Civil Practice Act of the State of New York, Section 48.

3. By virtue of Section 13 of the Civil Practice Act of the State of New York, the Statute of Limitations of the State of California, where the alleged causes arose, is applicable if defendant could have been sued in that state.

4. If the defendant was amenable to suit in California during the pertinent periods involved here, the California statute applies. If the causes of action are barred in California, they are barred in New York by Section 13 of the Civil Practice Act.

5. The cause of action alleged in the Gumbiner Theatrical case accrued in California on December 8, 1931. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the Paramount case. If National could have been sued in New York in an anti-trust case for any period of six years prior to July 20, 1938, the action would also be barred by the New York Statute of Limitations, regardless of whether barred in California, and regardless of any tolling effect of the Paramount case.

6. The cause of action alleged in the Bertha Building case accrued in California on July 4, 1935. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the Paramount case.

7. Spyros P. Skouras was an agent of National in New York during the period from 1932-1942, within the meaning of Section 4 of the Clayton Act.

8. Charles P. Skouras was an agent of National in California during all the periods of time here involved, within the meaning of Section 4 of the Clayton Act.

9. National Agency Corporation was an agent of National in New York after its organization in 1935, within the meaning of Section 4 of the Clayton Act.

10. Throughout all the periods of time here involved, National had one or more officers in New York upon whom service of process could have been made within the meaning of Section 19 of the Civil Practice Act of the State of New York. Section 19 did not operate to toll the New York Statute of Limitations. Defendant, moreover, was amenable to suit in New York under the venue sections of the anti-trust laws, which are the controlling venue statutes involved here.

11. The pleadings and affidavits filed by National in other cases to which plaintiffs were not parties, and which on their face were inconsistent with defendant's position here, are not conclusive upon defendant but were open to explanation and rebuttal.

12. No element of estoppel operated in these cases in favor of plaintiffs to preclude defendant from offering evidence with respect to its business activities in California and New York.

13. National, within the meaning of the venue provisions of the anti-trust laws, transacted business and had agents in California for three years after the causes of action in both cases arose and could have been sued ther Both causes of action were, therefore, barred by the California three year Statute of Limitations prior to July 20, 1938.

14. The complaints must, therefore, be dismissed.

/s/ CLARENCE G. GALSTON,
U. S. D. J.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 330

BERTHA BUILDING CORPORATION,
Plaintiff-Appellant,

—against—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

AND

No. 329

GUMBINER THEATRICAL ENTERPRISES, INC.,
Plaintiff-Appellant,

—against—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

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Supplemental Opinion of Judge Rayfiel on the Separate Trial of the Issues Raised by the Defense of the Statute of Limitations

United States District Court

EASTERN DISTRICT OF NEW YORK

GUMBINER THEATRICAL ENTERPRISES, INC. *vs.* NATIONAL THEATERS CORPORATION	Civ. 12074
BERTHA BUILDING CORPORATION *vs.* NATIONAL THEATERS CORPORATION	Civ. 12073

Appearances:

CORCORAN & KOSTELANETZ, Attorneys for Plaintiff. By Boris Kostelanetz, Esq., for the motion.

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY, Attorneys for National Theaters Corp. By Frederick W. R. Pride, in opposition.

RAYFIEL, J.

SUPPLEMENTAL MEMORANDUM

In my decision dated June 10, 1954, in the above-entitled action, believing that there was no opposition thereto, I granted plaintiff's motion for a separate trial

Supplemental Opinion of Judge Rayfiel on the Separate Trial of the Issues Raised by the Defense of the Statute of Limitations

to the Court and a jury of the issues raised by the defense of Statute of Limitation. I have since examined the applicable portion of the transcript of counsels' argument of the motion before the Court and learned that the consent of defendant's counsel was limited to a separate trial of such issues to the Court alone.

The defense of the Statute of Limitations is legal in its nature and involves issues which in my opinion the plaintiff is not entitled to have tried to the Court and jury under the 7th Amendment to the Constitution of the United States.

Accordingly my aforementioned decision is modified to that extent and I shall sign an order consistent therewith.

Dated: June 25, 1954

Signed LEO F. RAYFIEL
United States District Judge

Transcript of Record

Colloquy

[13] Mr. Pride: Well, your Honor, may I put it this [14] way: Would your Honor consider the position which we are urging here as a part of the trial, if you call it that, of this particular issue?

The Court: I will consider it as part, but not as independent of; I hope you understand that differentiation.

Mr. Pride: I, of course, want to conform entirely with what your Honor's wishes are.

I feel, your Honor, that however it be designated, that the legal aspects of the defense of the Statute of Limitations which enters into the trial of that issue of course, that in so far as they are involved with respect to the allegations of the plaintiff's complaint and the legal effect of those allegations, I respectfully submit that it is in all respects in order to bring those to your Honor's attention at the commencement of the trial.

* * *

[18] The Court: But Mr. Kostelanetz says he is ready to try this case; we should go ahead with the trial. That is what we will do.

Mr. Pride: Judge, for the record, you are not ruling by going ahead with the trial that I am precluded from bringing on this motion for judgment on the pleadings?

The Court: Not a bit. I understand your prior position to be that you could bring this on at any time during the trial, during the trial of this issue that has been sent to me.

Mr. Pride: Yes, that is right.

The Court: Very well.

* * *

[19] Mr. Kostelanetz: All right, sir.

I take it, your Honor, this being a trial without a jury, we may as well proceed with our evidence.

Colloquy

Does your Honor care for opening statements?

The Court: No, I have read the brief; I know what it is about.

I will say to you now that if it falls within the framework of Hansen versus Swift, I will dismiss the case on the ground that the defense of the Statute of Limitations would be sustained. In other words, if the facts proved here bring this case within the framework of the Hansen-Swift case, then I shall resolve this issue in favor of the defendant.

Mr. Kostelanetz: Your Honor, I think we have your Honor's perspective, but on the other hand I think that the law of the *Hansen* case will be followed here by the plaintiffs because we see it as the law.

The Court: All right.

* * *

[22] Mr. Pride: This is the subject of introduction of what apparently are certain papers from other litigations in which——

Mr. Kostelanetz: Certified and exemplified copies.

Mr. Pride: (Continuing)—from other litigations in which this company was involved.

I think and believe because the entire position of the plaintiff here with respect to any facts upon which it contends the Court should find that National Theatres was not doing business in New York and California, and because any such evidence will depend and rest entirely upon statements made at various times in other unrelated litigation which National was party, that there should be a relation of the particular cases to which reference is made to the significant periods of time as to when we claim the Statute of Limitations was running and constitutes the bar to the case.

Colloquy

Now, some of these papers, as the plaintiffs have heretofore advised us, consist of an affidavit——

The Court: Let us have specific reference to this paper, that is all.

[23] Mr. Pride: Very well.

The Court: No, I want to hear you on this paper.

Mr. Pride: Oh, I am sorry, Judge.

Why, this paper, your Honor, is a motion in a case pending in the State Court of California entitled Jensen and Von Herberg versus WESCO Corporation.

Now, your Honor, WESCO Corporation is the same corporate defendant here that is under the name of National Theatres Corporation; the name was changed.

For ease, your Honor, suppose throughout this case we just refer to it as National, its present name?

Now, your Honor, in that case the defendant here was made a party defendant.

The case was brought in 1932, September, I believe, of that year. In that case a motion was made to dismiss as to National Theatres on the ground that it was not doing business in the State of California. The exemplified copy of the paper which plaintiff offers is a copy of that motion and that affidavit.

Now, your Honor, with respect to California, the three-year statute is applicable for the purpose of this case that is pleaded by the plaintiffs.

It is the plaintiffs' contention that National could not have been sued in California in the period between 1931, when this one action arose, and 1935, when the [24] second cause of action arose; that it could not be sued there between those dates and July 20, 1938.

Now, I refer to that date, your Honor, because it has a special significance in this lawsuit. On July 20, 1938, the

United States instituted an action entitled United States against Paramount, claiming violations of the Anti-Trust Laws on a national scale by all of the various interested companies in the industry, including the defendant National.

It is the plaintiffs' position here that from and after July 20, 1938, the running of all Statutes of Limitations were tolled by reason of the application of Section 5 of the Clayton Act. In other words, that——

The Court: I understand from the brief that that is their position.

Mr. Pride: Yes.

The Court: But, of course, that would be an unsound position if at that time the Statute of Limitations had run against the plaintiffs.

Mr. Pride: Precisely.

So we say here that the significant period in the first instance in this lawsuit—and you will not have to determine the question of the Paramount case—the significant period with respect to California is a period of three years prior to the institution of the [25] Paramount case. In other words, the three years prior to July 20, 1938.

The Court: Yes, Mr. Pride, and I take it that Mr. Kostelanetz offers this exhibit to show that the position of the defendant at that particular time was that it was not doing business then.

Mr. Pride: The position which it took in this litigation in 1932.

Now, my point is that this statement, in the first place, has no—well, establishes nothing with respect to the later years, 1930 to 1938.

* * *

John P. Edmondson—Direct

[73] JOHN P. EDMONDSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

* * *

[105] Q. Do I understand that at these regular meetings of this Board of the Agency Corporation all substantial transactions affecting the operation of theatres in California and elsewhere were passed upon? A. Yes, sir.

Mr. Kostelanetz: I object.

The Court: I sustain the objection as to the form of the question.

* * *

[112] Q. Now, I am addressing my question, Mr. Edmondson, to this entire period from 1932 to 1942——

Mr. Kostelanetz: I am sorry.

Q. I say, do you understand that my questions apply to this entire period from 1932 to 1942? A. He had personnel; whether the same personnel were there at all times during that period, I can't say.

I have been out of the operation for fourteen years, and I am simply giving the very best evidence I can, based on my recollection. I recall certain names of the head film buyers; at one time it was Eddie Alperson, at another time it was a man by the name of Ed Zabel; there were numerous other people—Lundgren and others that were there who assisted him.

Now, as to what time they started in or dropped off, I am not clear.

Q. Yes, but you are clear that throughout this period Mr. Skouras did have assistants working for him in this field; [113] is that right? A. Yes, sir.

* * *

John P. Edmondson—Direct

[126] Q. Do you know whether Mr. Sullivan entered upon employment pursuant to the provisions of this agreement, Mr. Edmondson? A. Yes, sir, he did.

Q. And do you know how long he continued in that employment? A. I believe he continued until his death. He was not well at the time this contract was executed; as a matter of fact, he had ulcers of the stomach. One of the reasons that he did not want to leave his native heath to come here and work in this city was because of that fact, and so they put in there the provision that in event he had to spend six months here in New York, in New York City, he could terminate the contract.

Q. His home being in Los Angeles? A. Yes, sir.

* * *

[130] Mr. Kostelanetz: May I ask Mr. Edmondson:

Based upon your familiarity with these records whether or not the records record directly the action taken by the Board of Directors with respect to the matters which are contained therein?

The Witness: Yes, sir, they do. I drew, I should say, practically all of those minutes, dictated them, and I always tried to reflect just what was decided.

* * *

Cross-Examination by Mr. Kostelanetz:

[145] Q. Now, in the year 1930 and 1931, sir, were you associated in any official capacity with WESCO Corporation, then known as WESCO Corporation? A. I don't believe so, I think in that period of time I was working in the Law Department there under Mr. Rogers, and I couldn't definitely identify myself with any company. I don't believe I was an officer of any company, I was simply a kid fresh out of law school doing what they told me to do.

John P. Edmondson—Cross

Q. Now, in the year 1932, I think you testified on direct examination you became assistant secretary of WESCO? A. Yes, sir.

* * *

[160] Q. So actually you had management or a supervision company entitled Agency, which in turn had supervision companies and management companies, had its own children geographically; is that it? A. It didn't work just that way, Mr. Kostelanetz.

There was National Theatres Corporation which had a contract with the Agency Company, as we have seen here. The Fox West Coast Theatres had a subsidiary called Fox West Coast Agency Corporation. Now, that Agency Company had a contract with the National Agency Company.

Q. I see, I see. A. That was the arrangement, as I recall it. That also applied to the other divisions, such as in the mid-west and in Kansas City, in Denver and in Seattle and Milwaukee; they were the principal operating places.

* * *

[163] Mr. Pride: It is conceded in this action that the causes of action in the first case accrue——

The Court: What do you mean, in the first case?

Mr. Pride: There are two cases or causes, the Gumbiner Theatrical and the Bertha Building Company case.

It is conceded by the plaintiffs that the cause of action accrued in the Gumbiner Theatre case on December 8, 1931.

[164] The Court: I noticed you said that in your brief.

Mr. Pride: Yes, sir.

Mr. Kostelanetz: We say it in our brief, too.

The Court: Do you agree with that?

Mr. Kostelanetz: Yes, your Honor.

The Court: And the second, 1935 some time?

Mr. Pride: Yes, your Honor, July 4, 1935.

Mr. Kostelanetz: July 4, 1935, yes.

The Court: So that I may assume that in resolving this issue of Statute of Limitations that in the first, the action accrued some time in 1931, and in the second action, in 1935?

Mr. Pride: That is correct, your Honor.

The Court: Well, that helps.

Mr. Kostelanetz: That is right, your Honor.

By Mr. Kostelanetz:

Q. Now, Mr. Edmondson, on your direct examination in reply to Mr. Pride, you said something concerning the preparation of an affidavit in relation to California, or some tax action. Unfortunately, the minutes aren't here, and the stenographer has been upstairs. Could you repeat what you said, sir?

The Court: You mean as to the testimony this morning?

[165] Q. In what year was it that tax counsel came to you and [166] said that there was a tax problem? A. The tax problem was discussed at various meetings. I don't recall whether at Board Meetings or just how the problem came up.

Q. Would you state who was present, sir, at these tax problem conferences, and could you place the date? A. I can't place any specific date of conversation.

Q. The approximate date. A. I have been out of the company for, what is it, 14 years, and you are now asking me to go back to 1934 or 1935 and pinpoint a specific con-

ference on a subject, and I can't do that. I can give you my general impression of what we talked about.

Q. Well, suppose we have it in legal form, sir.

What is your recollection of the first conference on the tax problem, and who was present? A. My recollection of the problem, that came after the reorganization of the company where Chase Bank took over the majority position. Now, there were many firms of attorneys in that, and one of the firms, together with our general counsel, Dwight, Harris, Koegel & Caskey— –

Q. They have been your general counsel throughout this thing? A. Yes, sir. (Continuing)—expressed some concern as to whether [1.7] National from a tax point of view was doing business in New York, and we all worked—

Q. Can you place the speaker, sir, who said that? A. I can't place the speaker, I can give you my impression. The moving force in it was an attorney from Mudge, Stern, Williams & Tucker, an attorney by the name of Julian Hagen.

Q. As secretary of the corporation, it was your faithful job to record conversations as they occurred; is that right?

Mr. Pride: I object to that.

The Court: I sustain the objection.

Mr. Kostelanetz: All right, sir.

Q. Would you state, Mr. Edmondson, whether the conversations and the problems concerning the tax status of National Theatres Corporation in New York or California were recorded in these eight volumes of minutes which you have brought to court here, or rather counsel has brought to court? A. No, sir, I don't think they were.

Q. That was something that was off the record; is that right?

The Court: No, I don't think that is fair to say, Mr. Kostelanetz.

We know that in corporate management there are many things that occur, even at a board meeting, which are not included in the minutes, and not for the purpose [168] of hiding something from an official or other interest, but because they are not properly part of the minutes.

If advice is given by an attorney who happens to be present, it may not become the subject of a resolution by anybody who is present at that meeting.

Mr. Kostelanetz: If your Honor please, I don't necessarily draw any nefarious inference from the fact that something is missing. I merely asked whether that was recorded, sir.

The Court: Ordinarily matters of that sort would not be recorded, and I am talking now of corporate organizations. I don't know anything about this company.

If it were the custom of the secretary of the company to take a transcript of everything that was said by everybody who was present and incorporate all of that in the minutes of the board meeting, well and good.

Was that your custom?

The Witness: No, sir, it was not, sir.

* * *

S. P. Skouras—Direct

[200] SPYROS P. SKOURAS, called as a witness, having been first duly sworn, testified as follows:

* * *

[208] Q. He established an office there, did he, when he moved to California?

Mr. Kostelanetz: If your Honor please——

The Court: Mr. Pride, in the first place perhaps you ought to ask the witness where its western office was.

Mr. Pride: Yes.

The Witness: The western office was in Los Angeles, Washington and Vermont.

The Court: Where did your brother have his office?

The Witness: At the offices in Los Angeles, on Washington and Vermont Streets. The main offices of the company.

* * *

[219] Q. Does that refresh your recollection as to whether or not, Mr. Skouras, Wesco guaranteed other notes of a similar nature made by its subsidiaries?

Mr. Kostelanetz: Your Honor, I respectfully object. The papers ought to be here.

Mr. Pride: Your Honor, I have a stack of them this high (indicating). It is just to keep from cluttering up the record that I have done it this way.

The Court: I overrule your objection. I suggest that you permit counsel to look at those papers between sessions of the court.

Mr. Pride: Surely.

[220] The Witness: Your Honor, it would be a long story, your Honor, and if you permit me to

qualify it I would like to say at that time the corporation was losing large sums of money, and we had to borrow money, and we hypothecated all the clear property, as I recall it.

* * *

[225] Q. Mr. Skouras, I show you what has been marked as Plaintiffs' Exhibit 19, being an agreement between the National Theatres Corporation and National Agency Corporation, and I ask you if you were familiar with that agreement? A. Frankly, I don't remember all the agreement contains, Mr. Pride, since it is almost twenty years.

Q. Yes, but do you know such an agreement was entered into? A. Well, it is this agreement.

Q. And do you know whether or not National Agency [226] Corporation performed certain services for National Theatres Corporation under that arrangement? A. Yes, sir.

* * *

[231] Q. And with respect to the contract which you and your brother had with National Theatres Corporation, your services were assigned to the Agency Corporation; is that correct? A. But we held the National Theatres responsible.

Q. Yes, yes, I understand that, Mr. Skouras.

* * *

[232] Q. What was the procedure, if any, which existed with respect to theatre acquisitions or major capital transactions involving the theatres in the various districts where they were located? A. According to my recollection—your Honor will excuse me, I can't remember correctly, but I am

under the impression that where there were traders or landlords or financial people, they had never taken the Agency as the principal. The Agency was acting for the principal, the National Theatres. Now, that is my recollection.

* * *

By Mr. Kostelanetz:

[246] Q. When, sir, did you first get any information that WESCO was doing business in the State of New York? A. Since I was employed.

Q. All the way back to January, 1932; is that right? A. As far as I can say, yes.

Q. Now, you certainly knew, sir, that—on your testimony in chief here—that WESCO or National Theatres did business in the State of New York in 1935, 1936, 1937, 1938, 1941 and so on? A. Yes, sir.

Q. And you knew, sir, that from time to time your corporation would get sued? A. To my sorrow, yes, sir.

Q. And from time to time, when your corporation got sued, it became important to know whether your corporation, [247] National Theatres, did or did not do business in the State of New York?

* * *

A. I was employed in New York. I was doing business in New York all the time.

Q. Yes, sir, and I don't find fault with you, sir, but I am talking about WESCO and National Theatres: Did you know that when litigation time came it became important to know whether WESCO or National Theatres did or did not do business in New York?

* * *

A. I don't know the state exactly, Mr. Kostelanetz. I don't want to be difficult. I don't understand your question. If

you will be kind enough to simplify it—excuse me, your Honor.

Q. Let me help you, sir.

The Court: You don't have to answer any questions that you don't understand.

Q. Let me see if I can help you, sir.

It is correct, sir, in 1941 that the principal [248] business of National Theatres, the principal place of business of National Theatres Corporation was located at 2854 Hudson Boulevard, Jersey City, New Jersey? A. No, sir.

Q. Is it correct, sir, that National Theatres Corporation does not maintain an office in the territorial jurisdiction of the Southern District of New York—you know the Southern District? A. I know.

Q. Up to Albany. A. As far as I was concerned, I never accepted that theory. It was Mr. Hagen's theory, and I couldn't help it.

Mr. Kostelanetz: I respectfully move to strike out "Mr. Hagen's theory," your Honor.

The Court: Strike it out.

By Mr. Kostelanetz:

Q. Is it correct, sir, that "National Theatres engages in no other business other than holding stock in and other securities"; is that correct? A. National Theatres owned many corporations, some, many subsidiaries being wholly owned, and some partially owned, and I was working for the National Theatres which had very substantial assets.

Q. Let me put the question again.

[249] Q. Is it correct that "National Theatres engaged in no other business other than holding stock in and other securities"; is that right? A. That I don't understand, I didn't understand it.

> The Court: Well, what Mr. Kostelanetz is in effect asking you, Mr. Skouras, is whether the entire business of National Theatres was confined to holding stock in other companies.
>
> The Witness: Frankly, your Honor, I can't answer yes or no.
>
> The Court: All right.

By Mr. Kostelanetz:

Q. Let me see if I can help you, sir.

I think you testified about a half hour ago that Agency, sir, that Agency later called Amusement, was just a shell corporation? A. Correct, sir.

Q. Now, would you please tell me if this is correct, and I refer to pages 81 and 82.

> ". . . WESCO, later changed to National. It simply held stocks in other companies. It was more or less a shell of a company."

Now, is that correct? A. WESCO?

Q. Yes, sir, WESCO was a shell. A. No, sir, it couldn't be a shell. It had all the assets. It would be silly if I made a contract with a shell corporation.

[250] Q. Well, let us see, among the assets, Mr. Skouras, and these assets ran into tens, and twenties, and one hundred million dollars or so——

The Court: Of which company?

Mr. Kostelanetz: Of WESCO, later called National.

A. It had very substantial assets of millions of dollars, yes.

* * *

Q. Was it correct, sir, and this is in relation to a definition appearing at Page 81, 82, concerning WESCO, that the function of the company was merely to hold the stocks and collect dividends, when declared, by the various subsidiaries, and then pay out, if such action was deemed necessary by the Board. That is in relation to the definition of shell. A. I can't agree with you, Mr. Kostelanetz, that if a corporation can collect the money, and pay dividends, and owe money, that it is a shell corporation. My understanding is, and maybe it is entirely wrong than yours, but a shell corporation has no assets; cannot pay dividends, cannot collect money; and it doesn't owe money. But WESCO owed money.

Q. WESCO owed money? [251] A. Yes.

Q. Now, is it correct, sir, speaking as of 1941, that at all times since December 29, 1934, the principal office of National Theatres Corporation has been in Jersey City, New Jersey; no meetings of stockholders, directors, or of the auditing committee were held in the Southern District of New York. Is that correct? A. As far as I am concerned the main offices of the corporation was 444 West 56th Street. It is true the accounting department over a period of a year and a half or two years, and the Board of Directors' meetings took place in Jersey, because the Chase Bank's lawyers insisted upon it.

* * *

[259] Q. Well, now, you testified initially, sir, when you took the witness stand that National Theatres was in the business of exhibiting motion pictures through theatres. Did you so testify, sir? A. Correct. That was the main business.

Q. Now, at page 249, Judge Galston, the presiding judge, paraphrased or restated a question of mine, and asked you, Mr. Skouras, whether the entire business of National Theatres was confined to holding stock in other companies.

He asked you that question, sir, and you said that you couldn't answer yes or no. Now, that is correct, that happened yesterday, did it not? A. Yes.

Mr. Pride: What page?

Mr. Kostelanetz: 249.

Q. Now, can you answer whether the entire business of National Theatres was confined to holding stock in other companies? A. Again I am in the same position as to whether National Theatres was the owner, through the ownership of stocks of other companies, or whether they had any direct assets. I am not in the position to answer you yes or no. I don't know whether they are the owners only of the stock of other corporations with no direct assets. That is what you asked [260] me, Mr. Kostelanetz. You asked me if the National Theatres, they had any direct assets in their own name.

Q. Yes. A. Do you mean all the stocks of all of the subsidiary corporations?

Q. National Theatres owns a lot of stocks in other corporations, is that correct? A. Throughout the Midwest and West Coast.

Q. That is where the corporations are located? A. Yes.

* * *

[271] Q. Now, I would like you, Mr. Skouras, for a moment—I will withdraw that.

You testified on your direct examination that from the beginning, at about the time of your election in 1932, right up to 1952, I guess, you traveled a great deal all over the country; is that right? A. Yes, sir.

Q. And as a corporate executive, sir, it is perfectly fitting and proper, as you know, to submit expense accounts to your employers?

Mr. Pride: I object to the form of the question, sir.

Mr. Kostelanetz: It's preliminary.

Q. I would like to know, sir, do you have the expense accounts which you submitted to your employers in court here, that is during those years?

The Court: If there were such.

Mr. Kostelanetz: Yes, if there were such things.

A. Expense accounts of the people that were traveling with me and my own expense account?

Q. Your own expense account. A. Yes?

[272] Q. Do you have those papers in court? A. No, how can I?

* * *

[274] Q. Now, Mr. Skouras, I wish you would turn your attention to California, sir, and let us cover the period when you were either the president or the executive vice-president of National Theatres.

You testified on your direct examination that National Theatres opened an office there in 1932, when your brother

Charles went to California; is that right? A. There was an office there, they had the office there.

Q. Yes, but I mean National Theatres had the office there in 1932, and your brother Charles—— A. It was the WESCO at that time.

Q. The WESCO? A. Correct.

Q. I see.

In other words, WESCO and later National Theatres occupied an office there from 1932 right down to the time of the divorcement; is that right? A. Until the present time.

Q. Right to the present time?

And National Theatres office in California, as you stated on your direct examination, I think you said, was headed by your brother Charles until he passed away a year or so ago; is that right? A. Yes, sir.

[275] Q. Now, still staying with California, Mr. Skouras, when National Agency or National Amusement was created, that company went out to California, too; is that your testimony on direct examination? A. What period?

The Court: What do you mean "went out to California"?

Mr. Kostelanetz: I am sorry.

Q. Had an office in California. A. What period are you talking about?

Q. National Amusement was created or National Agency was created in 1935, and I guess it is still alive, isn't it? A. I am not so sure; at the present time, I have no relation of any kind with the corporation, but at the time when I was associated, or rather even up to the time that Twentieth Century-Fox owned the National Theatres, the

National Amusement Corporation was operating everywhere.

Q. And it was certainly, according to your testimony I believe on direct, operating in California; is that right? A. In the same manner as it was in New York with National Theatres.

Q. Now, you also had, out on the West Coast a company known as Fox West Coast Theatres Corporation; is that right? A. A subsidiary of the National Theatres.

[276] Q. And Fox West Coast Theatres was, as I take it, a 100 per cent owned subsidiary, is that right, or substantially? A. That is my impression, yes, sir.

The Court: Owned by what corporation?

The Witness: The National Theatres Corporation.

* * *

Q. Did it operate some theatres in its own name? A. As far as I am concerned, all the theatres were operated by National Theatres, Mr. Kostelanetz.

[277] I am awfully sorry, you can't divorce me from one point of view of my honest belief that National Theatres was the corporation that was doing business.

* * *

[279] Q. In addition to Fox West Coast Theatres Corporation, you had out on the West Coast an organization known as Fox West Coast Agency Corporation; is that right? A. At the time when the Fox West Coast Agency—you say Fox West Coast Agency?

Q. Yes. A. I don't remember if we did. I was under the impression that it was the National Amusement Corporation—it probably must have been the Fox West Coast Agency Corporation—I am not clear in that, Mr. Kostelanetz, I don't remember it.

Colloquy

The Witness: Mr. Kostelanetz, if you will permit me, if I appear to you difficult, I did not attach any great credence to these agencies, they were an instrumentality of service. Please believe me. And no matter how many questions you put to me, I know what you [280] are trying to get, but I can't help it.

* * *

Mr. Kostelanetz: If your Honor pleases, I have a small item which I would appreciate the discretion of the Court to entertain.

Your Honor, we have an attorney here in court pursuant to a subpoena duces tecum, the senior attorney of the Director of the Corporation Tax Bureau, and he is here with certain papers subpoenaed from the State of New York dealing with the qualifications of National Theatres Corporation to do business in New York, and correspondence, and so on.

Now, I fancy that it probably will not be necessary [281] to call him to the witness stand and be sworn. He has the papers here, your Honor, but apparently they have an office rule or office procedure with regard to the production of those papers being subject to the direction of the Court, and since they are taxpayers, I believe that the production has to be with the consent of the taxpayer, or the defendant in this case.

Mr. Pride: These are the qualification papers of National Theatres in 1949 in New York; is that right?

Mr. Kostelanetz: This deals with correspondence and qualification papers, forms of application.

Now, the exact papers are: "All papers, records, correspondence and affidavits and any and all other

memoranda relating to the qualification of National Theatres Corporation, a Delaware Corporation, formerly known as WESCO Corporation to do business in the State of New York and the payment of the franchise taxes in the State of New York by National Theatres Corporation prior to the year 1950."

The Court: What do you want, to offer those in evidence?

Mr. Kostelanetz: I may, your Honor, if they are relevant.

[282] Unfortunately, your Honor, Prentice-Hall which qualified this company, on examination before trial found that it had destroyed the papers or couldn't find them.

I will probably want to offer them in evidence.

The Court: What direction do you want from me now?

Mr. Kostelanetz: If it is satisfactory to your Honor, a direction that the papers be produced, and, with the consent of the defendant, shown to me, and if relevant I will offer them, of course.

* * *

[284] The Court: These are impounded by this Court and they will be kept in the custody of the Clerk, and I want them returned to—is it the Corporation Counsel?

Mr. John A. Ross: I am the attorney for the State Tax Commissioner.

The Court: The attorney for the State Tax Commissioner, I want him notified as soon as you have determined what you want to do.

Mr. Kostelanetz: Very good, your Honor.

Colloquy

The Court: Can't you read them now into the record, that is what you want, and then let this attorney take them back?

Mr. Kostelanetz: I will do that, your Honor, or proceed with Mr. Skouras, whichever you like.

The Court: Well, I think that you would feel happier to get them back.

Mr. John A. Ross: Yes, sir, I would.

The Court: All right.

Mr. Kostelanetz. Then I will look them over right now.

[285] Mr. Kostelanetz: We had pending a request for certain documents concerning agreements between National Agency and Fox West Coast Corporation, or Fox West Coast Agency Corporation and Fox West Coast Agency.

(Mr. Pride hands papers to Mr. Kostelanetz.)

Mr. Kostelanetz: Thank you very much, Mr. Pride.

I won't take the time to read it now but could I just have it marked for identification in the meantime?

The Court: Yes.

Mr. Kostelanetz: It consists of a letter dated December 2, 1935; another letter of February 25, 1936, and a printed agreement of July 14, 1938; and a photostat dated December 14, 1944.

(Letter dated December 2, 1935; letter dated February 25, 1936; and printed agreement of July 14, 1938, and photostat dated December 14, 1944, referred to were received and marked Plaintiffs' Exhibit 21 for identification.)

* * *

[287] Q. Now, as early, sir, as 1932 what services were rendered in California for National Theatres Corporation—not for any other subsidiary—but for National Theatres Corporation by, let us say, Mr. Bertero in California? A. In 1932 was the Fox West Coast.

Q. Yes. A. At that time Mr. Bertero, he was in—assistant to Mr. Charley Buckley, chief counsel of the Fox West Coast Corporation.

Q. You say he was employed there by WESCO? A. That is my impression, yes.

Q. Was he on the payroll of WESCO? A. That is my impression.

Q. WESCO Theatres? A. Either the service corporation or the WESCO. I can't remember.

Q. When you talk about a service corporation in 1932, which service corporation are you referring to? A. I don't remember whether it was the service corporation at that time or not, and if it was not it would be working [288] directly under one of the corporations of the Fox West Coast.

The only thing I know is Mr. Bertero was associated in the corporation. I don't know for what company he was working, the individual or not.

* * *

[296] The Witness: Off the record, your Honor, I am under the impression that we used to pay a certain amount of money to Fox by the week for the services that they rendered for all those utilities, telephone, electricity, heat, and so on down the line.

Mr. Pride: You are so right, Mr. Skouras, but the information called for here was direct payments made by National.

The Witness: We were paying to Twentieth Century Fox.

* * *

[299] Q. Mr. Skouras, directing your attention to New York, can you enumerate at the time you came into National Theatres in 1932, and let us say up until 1938 or 1939, the offices which you held in corporations which you had at this address at 444 West 56th Street? A. At first it was the WESCO, and National Theatres, and National Theatres Amusement Company.

Q. And how many others? A. I don't remember whether there were many others.

Q. Would there be as many as fifty, sir? A. No, sir, I don't think so. I don't think so.

* * *

[303] Q. Now, at these meetings, sir, which dealt with the preparation of these contracts, is it correct that there would be meetings called together in New York at which you and your assistants were present, and sales managers of various major producing companies, is that correct? A. All at the same time? Or do you mean individually? The meetings we would have only with our staff with one single company, the manager and his assistants.

Q. Then is it correct that you would direct a master sheet to be made up listing what picture was to be bought and what picture was to play at a certain time, and what clearances there would be with regard to a particular theatre; whether it played ahead of a theatre or behind a theatre? Did you direct all that, sir?

* * *

[304] The Witness: Yes.

Q. The answer is yes? A. Yes.

* * *

S. P. Skouras—Cross

[338] Q. Is it true that the defendant Twentieth Century owned all the stock of the defendant National? A. Correct.

Q. And that the defendant National owned all the stock of the defendant National Theatres Amusement Company, Inc.? A. Correct.

Q. Is it true that the corporations are separate entities and are operated as separate entities? A. That is a legal matter that I can't pass an opinion on.

Q. That none of said corporations is an instrumentality of the other, or of any other corporation? A. Again, in my own way, I can't separate one from the other, but it is a legal subject again.

[339] Q. And that none of said corporations engages in the business of the other, or of any other corporation, is that true? A. Well, the fact that Twentieth Century Fox was not engaged in theatres, and the National Theatres was not engaged in making pictures, that is true.

Q. Now about National Theatres not being engaged in the business of National Theatre Amusement Co., Inc., and vice versa? A. That I don't understand. How can that be. It is beyond my understanding.

Mr. Kostelanetz: All right, sir, that is an answer.

Q. Now, sir, and this time I refer to a case entitled Levy against Paramount, Exhibit 10, and I would like to ask you is it true that defendant National was a corporation organized under the laws of the State of Delaware? That is true, is that right? A. Yes.

* * *

[340] Q. Is it true that, certainly, as of 1952 National had its principal place of business in the City of New York, State of New York? That is true, isn't it? A. Yes.

Q. Now, to and including 1952, is it true that National has not had and does not have an office in the State of California, nor has it engaged in or conducted: nor does it conduct or engage in any business in the State of California. Is that true? A. No, sir.

Q. Is it true that National has never been found, or present, or had any agent in the State of California? A. Not according to my understanding.

* * *

JOHN B. BERTERO, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

* * *

By Mr. Pride:

[348] Did this company, Fox West Coast, have any interest in those theatres? A. No, it did not. The stock of that company, the Pacific Northwest Theatres, Incorporated, was owned directly by National Theatres Corporation.

Q. I see.

Would you proceed, please?

> The Witness: Was there a general question, Mr. Pride, what I did between 1933 and 1935?
>
> Mr. Pride: I thought I phrased it that way, that is as to whether you can recall any other matters that you had worked upon.

A. Well, as I say in day-to-day operations I would from time to time bump into a matter involving National Theatres Corporation and would give Mr. Skouras such advice or information as he desired.

Mr. Kostelanetz: Your Honor, I respectfully move to strike out the answer as a conclusion and as vague.

The Court: Anybody that "bumps" and talks about it isn't vague.

Mr. Kostelanetz: It is so hard to cross-examine, [349] your Honor.

The Court: I could cross-examine, I am sure that anybody else could.

I will overrule your objection, if it is an objection.

It is perfectly clear that the witness answered that from day to day there were matters involved which he participated in and which related to the companies, the names of which have been designated by him during the period from 1932 to 1935.

* * *

[355] Q. Do you recall the institution in that year, 1935, in the District Court of the United States, in the Southern District of California, of a certain action entitled H. L. Gumbiner against Fox West Coast Theatres, Charles Skouras, et al, and a number of other corporations, including Fox Film Corporation, various other distributing companies; do you recall the institution? A. I remember the action, yes.

Q. I ask you if you can identify the complaint in that action, Mr. Bertero? A. Yes, this is the action to which I had reference, at least it is the complaint in the action.

Q. Do you recall that case, Mr. Bertero? A. Yes, the general nature of the case.

Q. Were you familiar with the contents of the complaint?

Mr. Kostelanetz: I object to that, your Honor, this is not material.

The Court: Why not?

Mr. Kostelanetz: I don't know how this is possibly material, your Honor. I presume he is going to offer a [356] paper which I can object to, but in the meanwhile——

The Court: He doubtlessly will follow up the action on Gumbiner with some proof that Gumbiner owns or controls stock of Gumbiner Theatrical Enterprises, which is one of the defendants here.

Isn't that the purpose?

Mr. Pride: Why certainly, your Honor.

The Court: I will overrule the objection.

A. I am generally familiar with it, yes.

Q. Were you familiar at the time with H. L. Gumbiner, Mr. Bertero? A. I knew him, yes.

* * *

Q. Well, Mr. Bertero, who was Mr. Gumbiner? A. I met Mr. Gumbiner once or twice prior to the filing of the action. He was the operator of the Los Angeles, the Tower, and I believe one or two other small theatres in downtown Los Angeles, but he was known generally in the exhibition industry in Los Angeles as the operator of the Los Angeles Theatre and the operator of the Tower. I believe [357] he also had a theatre by the name of Cameo, but I am not sure.

Q. Let me digress for a minute.

Are you familiar with the allegations of the complaint in the actions before this Court? A. I have read them, yes.

Q. And you have referred to the Los Angeles and the Tower Theatres.

I ask you if those are the same theatres as are referred to and as are the subject of the complaints or the allegations in the complaints in the actions before the Court? A. They are the identical theatres.

Q. Now, Mr. Bertero, based upon your familiarity with the complaint which I have shown to you in this action which was filed by Mr. Gumbiner in 1935, do you recall in what capacity Mr. Gumbiner was instituting, purporting to institute the action involving these two theatres in that case?

Mr. Kostelanetz: Your Honor, I respectfully object. This has nothing to do with the Statute of Limitations; this is going to the merits, your Honor.

The Court: It has a good deal to do with the Statute of Limitations, but I think you ought to introduce the complaint as an exhibit.

Mr. Pride: Very well, your Honor, thank you. [358] I offer this complaint in evidence.

Mr. Kostelanetz: Your Honor, I object to this. I ask you to look at the complaint.

Neither these plaintiffs nor this defendant is a party to this document that is offered, neither National nor the two corporate plaintiffs.

Mr. Pride: Your Honor, you can see that the parent, the parent of National and the principal subsidiaries were parties.

The Court: I see Fox West Coast Theatres is named as the first defendant.

I will overrule your objection.

I also find Mr. Charles P. Skouras' name and others.

Mr. Kostelanetz: Your Honor, neither of the parties, neither of the three parties in the litigation before your Honor are parties to this paper.

The Court: I will overrule your objection.

(Document received in evidence as Defendant's Exhibit L, as of this date.)

By Mr. Pride:

Q. Now, Mr. Bertero, with the complaint before you, let me ask you if you were familiar with the nature of the action at the time it was instituted?

* * *

[359] A. Well, I became familiar with the complaint, Mr. Pride, at the time it was served upon the subsidiaries of National Theatres Corporation.

Q. And were you familiar with the nature of the claims that were inserted in the complaint at that time? A. Yes.

* * *

[360] Q. Now, Mr. Bertero, I direct your attention to the allegations contained in Section—to page 18, Section 10 of the complaint, in which it is stated that:

> "At all times herein mentioned subsequent to January 30, 1931, and prior to December 8, 1931, the plaintiff operated the Los Angeles Theatre in the City of Los Angeles, California."

Do you recall that allegation, Mr. Bertero? A. I have it before me and I recall that the plaintiff alleged that he was the operator of the theatre in Los Angeles.

Q. And it was in accordance with your information as to his position in the exhibition field at the time——

Mr. Kostelanetz: I object to it as immaterial, your Honor.

The Court: Overruled.

Mr. Kostelanetz: He is talking about Mr. Gumbiner, your Honor?

[361] The Court: Well, I repeat—no, I won't repeat because there is too much repetition in the case already, but I expect the evidence in regard to this action of Gumbiner to be connected with the ownership by Gumbiner of all the stock of one of the plaintiffs in this suit.

Mr. Pride: And also, your Honor, there is another reason for its relevancy here as I will show the part that National Theatres took in this litigation.

The Court: We are speaking of Gumbiner now.

Mr. Pride: Oh, yes; thank you.

The Witness: The answer to your question was yes, Mr. Pride.

* * *

[362] Q. Mr. Bertero, when we adjourned yesterday I was asking you certain questions about an action instituted in California in 1935 entitled H. L. Gumbiner against Fox West Coast Theatres and others, and the complaint in that action has been marked as Defendant's Exhibit L.

Now, directing your attention to the complaint in that action, Mr. Bertero, does the exhibit there indicate when the action was filed? A. The summons was issued on February 2, 1935, according to the copy attached to the complaint.

Q. February 2, 1935? A. Yes.

Q. Now, Mr. Bertero, in point of time, was National [363] Theatres Corporation engaged in any activities in the courts of California at or about that date?

* * *

A. According to my recollection, February 2, 1935, was the very date that the sale was made by the Trustees of the assets of Fox West Coast to National Theatres Corporation, that sale taking place in Los Angeles, and as I recall in attendance at that sale were not only attorneys for National Theatres Corporation, who had come out from the East for the purpose of participating in the transaction, but also several officers of National Theatres Corporation, including, I believe, Mr. Harry Cox. I believe that was his first trip to California, if I recall.

* * *

[364] Q. I direct your attention, Mr. Bertero, to the page following 51; it is unnumbered here. I direct your attention to that page of the exhibit which you have before you which reads as follows:

> "H. L. Gumbiner being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the complaint; knows the contents thereof; and that the same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to these matters he believes them to be true." Signed by H. L. Gumbiner and sworn to before Mabel C. Duval, Notary in and for the County of Los Angeles.

[365] In that connection with respect to this verification I now direct your attention to page 18 of this complaint in which appears this allegation:

> "At all times herein mentioned the plaintiff also operated the Tower and the Cameo Theatres in the City of Los Angeles, California."

And I believe that yesterday I directed your attention to the allegation appearing on the same page, that the plaintiff at all times subsequent to January 30, 1931, and prior to December 8, 1931 operated the Los Angeles Theatre in the City of Los Angeles.

Now, Mr. Bertero, with respect to these allegations to which I have called your attention, I ask you if you knew Mr. H. L. Gumbiner? A. I think I met him twice. In early 1931 I met him casually on a matter affecting our company. And again in about 1934, or about that time. I have no recollection of his appearance. But my contact was limited to these two occasions, according to my present memory.

Q. Well, in what capacity did you know him?

* * *

[366] A. Mr. Gumbiner was a well-known exhibitor in the City of Los Angeles.

He had conducted the operation of the Tower Theatre.

I believe he was the first exhibitor in the City of Los Angeles to install sound equipment in the year 1927 or 1928. Everybody in the business knew about his operation of the Los Angeles Theatre and of the Tower Theatre, and one or two other theatres in downtown Los Angeles.

He was very prominent in the newspapers with respect to advertising, using his own name.

Q. You mentioned advertising. Do you mean Mr. Gumbiner advertised in the newspapers—— A. Yes, I verified my recollection to that effect some time ago.

Q. I didn't hear that, Mr. Bertero. A. I said I verified my recollection as to what happened some twenty years ago, that he personally held himself out as the operator of the Los Angeles Theatre.

I sent one of our men down to the Los Angeles Times with respect to some advertising in these earlier years and got [367] one or two pieces of advertising which I delivered to our counsel here.

* * *

Q. Is this one of the advertisements to which you referred, Mr. Bertero? A. Yes. This is the sheet from the Los Angeles Times which was obtained for me by the man whom I instructed——

The Court: Never mind how it was obtained. What is the date?

The Witness: It is the Los Angeles Times of January 31, 1931.

* * *

[370] (Photostat of newspaper page, dated January 31, 1931, referred to, was received and marked Defendant's Exhibit M, as of this date.)

The Court: The other photostat may be offered subject to your objection.

Mr. Pride: The date of the second newspaper sheet is January 30, 1931.

(Photostat of newspaper sheet referred to, dated January 30, 1931, was received and marked Defendant's Exhibit N in evidence, as of this date.)

[371] Q. Now, I show you these two papers, Mr. Bertero, which are marked Defendant's Exhibits M and N in evidence, and I direct your attention to the statement appearing on Exhibit M, "The Los Angeles Theatre, unusual, Broadway between 6th and 7th", and the following state-

ment, "Independently owned and operated by H. L. Gumbiner." Also, to this statement appearing in Exhibit N reading as follows: " 'The Los Angeles' is independently owned and independently operated by H. L. Gumbiner."

Now, I ask you are those the references to which you referred in your testimony as to advertisements? A. Yes, these are the advertisements I obtained.

* * *

[372] Q. I will now show you copies of the two complaints which were filed in the actions now before the Court, and I direct your attention to the last page of each where there is the statement to this effect:

> "That H. L. Gumbiner, being duly sworn, says that he is the president of the Bertha Building Corporation, above-named plaintiff, and is authorized to make this verification on its behalf: He has read the foregoing complaint and knows the contents thereof and the same is true of his own knowledge except as to those matters which are alleged to be on information and belief."

Now, I further direct your attention to the allegation on Page 3, I believe it is, in the document which you have before you, to the effect that the plaintiff corporation—would you please give it to me—that the plaintiff corporation "is a corporation organized and existing under the laws of the State of California and from January 30, 1931, to December 8, 1931, it owned and operated The Los Angeles, Thea- [373] tre in the City of Los Angeles, State of California."

> The Court: Which complaint are you reading from?
>
> Mr. Pride: Your Honor, I was reading this from the Gumbiner Theatrical Enterprises complaint.

By Mr. Pride:

Q. Now, Mr. Bertero, can you state whether this is the same Los Angeles Theatre as to which Mr. Gumbiner independently said he was the operator in the complaint filed by him in 1935? A. I can, it is the same theatre, yes.

Q. And is the individual who verified the complaints in the two actions now before the Court the same individual who verified the complaint in 1935? A. I know of only one H. L. Gumbiner who had any connection with the Los Angeles Theatre.

Mr. Kostelanetz: If your Honor pleases, they are separate parties, obviously separate interests, as I understand it, your Honor.

The Court: Why do you object to a question like that, you know that it calls for the fact.

Do you deny that the Gumbiner in the action is the same one as verified these complaints?

Mr. Kostelanetz: Your Honor, I understand that there was an action previously in 1935 brought by Gum- [374] biner individually, sir, but there was no corporate action back at that time, your Honor.

The Court: Read the question to Mr. Kostelanetz.

(Previous question read.)

The Court: Now, do you have any objection?

Mr. Kostelanetz: No, your Honor.

The Court: You may answer.

A I think I did, but I will answer again. There is only one H. L. Gumbiner whom I ever heard of who operated the Los Angeles Theatre, and so far as I know I have every reason to believe that it is the same man who verified

the complaints in the instant action and also the one in 1935.

Q. Now, after the filing of this complaint in 1935, Mr. Bertero, what participation, if any, did National Theatres have in the defense of that action? A. Upon the purchase of the assets of the trustees at the bankruptcy sale, National Theatres Corporation was required by the trustees to indemnify them against certain contingent liability, including litigation. The trustees were named in the 1935 suit as defendants—am I correct?

Q. Yes. A. So therefore National Theatres was intimately connected with the action in that it had to indemnify the trustees [375] against any liability. Therefore, the filing of the action was brought to the attention of the officials of National Theatres Corporation in New York, and they designated counsel in Los Angeles to represent the main defendants in the action, and indirectly their own interests.

* * *

Q. Do you know who was retained, Mr. Bertero—please strike that.

Do you know who was retained in line with the advice or directions that you said were given by National Theatres Corporation? A. Mr. Alfred Wright of Los Angeles, a lawyer, was retained to put in the appearance of certain of the defendants and to represent those defendants.

Q. And with respect to the participation of National Theatres Corporation in the defense of this action in the respects that you have indicated, have you examined at my request the minute books of the meetings of the directors of National Theatres Corporation in so far as they relate to this procedure? A. Yes, I examined the minutes in relation to this action.

[376] Q. I show you a paper which purports to be an excerpt from the minutes of the meeting of the Board of Directors of National Theatres, and I ask you if that is a resolution which appears in those minutes? A. This appears to be a true copy of the resolution.

Q. And is that the resolution to which you refer? A. It is.

Mr. Pride: I offer it in evidence.

* * *

(Excerpt received in evidence as Defendant's Exhibit [377] A-1, as of this date.)

Q. Now, Mr. Bertero, do you know what disposition was made of this action which was instituted by H. L. Gumbiner in 1935? A. Yes, I do.

Q. And what disposition was made of it, sir? A. A settlement was reached between the plaintiff and the defendants. The plaintiff gave to our attorney, Mr. Wright, as I recall the man to whom the letter was addressed, an acknowledgement that—that is the plaintiffs' attorney gave our attorney an acknowledgement that the action brought was without merit, that was one document; then there was a general release running in favor of all of the defendants named in the complaint, and also a stipulation for dismissal with prejudice of the action which was filed with the local District Court some time in or about late May or June of 1935, and at the same time one of the subsidiaries of National took a lease, I think it was a ten year lease, of the Tower Theatre in Los Angeles for a period running around from July 1935 or thereabouts, and it had a rental of about $45,000 or $50,000 a year. That was one of the documents that were executed at the time that the papers were signed.

Q. Did you participate in any way in the settlement which [378] was effected of this litigation? A. The main negotiations were conducted by Mr. Buckley I have no recollection that I can testify to except I do remember accompanying Mr. Buckley to the office of Mr. Gumbiner's attorney in downtown Los Angeles, and I remember executing some of the papers that were exchanged between the parties to accomplish the settlement and dismissal of the action with prejudice.

Q. Was that occasion when you went to Mr. Gumbiner's, the office of Mr. Gumbiner's attorney, in connection with the closing or consummation of this settlement? A. Yes, it was in connection with the closing.

Q. And that took pla e where? A. In the office of Mr. Jules Goldstone who was the counsel of record for Mr. Gumbiner.

* * *

[379] Q. I show you, Mr. Bertero, a paper which purports to be [380] a copy, a photostatic copy of an instrument filed in the District Court of the United States for th Southern District of California in the matter of H. L. Gumbiner against Fox West Coast Theatres, et al, and I ask you if that refreshes your recollection as to whether such a document was filed?

The Court: Is that the instrument that he referred to ?

The Witness: This is the instrument.

Mr. Pride: That is a copy to which he referred?

The Witness: This is a stipulation of dismissal that I referred to, yes.

* * *

[387] Q. In connection with your association with Mr. Charles Skouras in the years between, let us say, 1935

and 1938, was the association such as to cause you to be informed as to work which he did for National Theatres Corporation? A. Yes, in a general way I became acquainted with many of the problems that he was working on. It was Mr. Skouras' practice to have his close advisers around him at all times, and he liked as many people as possible sharing in the problems and trying to arrive at solutions of them, and so during that period I spent many hours in his office, with other people.

Q. Respecting affairs of National?

Mr. Kostelanetz: I object to that, your Honor.

The Court: Sustained.

I call your attention, Mr. Pride, to the fact that you yesterday afternoon examined Mr. Bertero on his activities for National. I refer you to page 345, and the question is:

"Q. Well now, Mr. Bertero, directing your attention particularly to the period from 1932 through 1938, do you recall what services you performed in California for National Theatres Corporation?"

Now, why do we have to go over that again?

[388] Mr. Pride: I was asking what Mr. Skouras did, your Honor.

The Court: Well, the answer to that question incorporates everything that this witness did.

Mr. Pride: Yes, but I was asking about Mr. Skouras.

The Court: Well, that was part of his function, to cooperate or work with Mr. Skouras.

Mr. Pride: If your Honor pleases, this Mr. Charles Skouras is dead, and I want to bring out through this witness the acts of Mr. Skouras, as one of the general managers——

The Court: If your answer yesterday afternoon, Mr. Bertero, if that answer wasn't comprehensive enough, you may add to it.

The Witness: Well, your Honor, my recollection of my testimony yesterday is to the effect that I was acting under Mr. Skouras and doing those things I did at his direction, so to that extent I narrated the activities of Mr. Skouras, as far as I recall them, during those years as they pertained to matters other than Fox West Coast Corporation.

* * *

[406] Mr. Pride: That is all.

While I was examining Mr. Bertero, your Honor, there was one paper which your Honor said could be marked as an exhibit, and I apparently neglected to have it marked before I used it. I want your record to be complete, and so I would like to have it marked at this time.

If you recall, your Honor, it is a copy of the stipulation of dismissal entered on the order of the Court in this Gumbiner case in 1935.

The Court: I have marked it as Exhibit O previously.

Mr. Pride: Then that is fine. I wanted your record to be accurate.

[407] (Stipulation of dismissal in re Gumbiner case referred to, was received and marked in evidence as Defendant's Exhibit O, as of this date.)

* * *

Cross Examination by Mr. Spanos:

[425] Q. When in point of time in relation to the date September 26, 1932, was it, Mr. Bertero, that you took this

trip with Mr. Skouras about which you testified on your direct examination? [426] A. What trip?

Q. Through Montana and some of the northwestern states where you now recall that he made a statement to you about the plans of National Theatres. A. You didn't hear my testimony. I did not take a trip with Mr. Skouras to Montana.

I was asked by Mr. Skouras to go to Montana.

Q. I see. A. And that was in or about 1937, possibly 1938; I can't place the year.

Q. Now, when in point of time was this date, September 26, 1932, in relation to the commencement of your association with Mr. Skouras? A. I met Mr. Skouras when he came to Los Angeles in March of 1932; I left for New York with Mr. Buckley in late May of 1932, and returned in the middle or latter part of July of that year, but I had contact with Mr. Skouras from the time and during the period I was in Los Angeles.

Q. That is Mr. Charles P. Skouras? A. Yes, Mr. Charles P. Skouras.

Q. And did you also have contact with Mr. Spyros Skouras in California during that period? A. I remember, I believe he came to the Coast with Mr. Charles Skouras at the time Mr. Charles Skouras became co-manager of [427] the properties, and then I don't recall meeting him again until I met him in New York with Mr. Buckley at the time we negotiated the large loan with Chase National; I don't recall meeting him after I left New York until September of 1932.

* * *

[441] Q. Mr. Bertero, in answer to certain interrogatories propounded by the plaintiffs in this case the defendant has listed certain cases in which it was named as a defendant

in California, in either the State or Federal Courts, and as to some of these cases it appears from the answer to the interrogatories that the defendant was not served.

I want to call those particular cases to your attention and ask you a question in connection therewith. A. These are cases, Mr. Spanos, in which National Theatres Corporation was not served with process?

Q. Right.

* * *

[442] Now, do you recall, Mr. Bertero, whether as to any of these cases any attempt was made to serve National? A. Well, I would not know the inactivity or activity of the plaintiffs or their attorneys in any action where National—where the marshal had instructions to serve, there was always available in California Mr. Charles P. Skouras, president of [443] National Theatres, and Mr. Harry C. Cox, the vice-president of National; and National was served in a number of actions and it was just a matter of the plaintiffs getting out the process and serving the process.

Q. And did you personally take any part in any case, in seeing to it that National was served? A. I made it convenient time and again for the United States Marshal to serve either Mr. Skouras or Mr. Cox. I must have taken the Marshal into Mr. Skouras' office on possibly four or five occasions; but normally, in order not to disturb Mr. Skouras, I would see that he served Mr. Cox.

In one or two instances I think I may have accepted service.

Q. You, yourself, accepted service? A. After finding out that it was agreeable to accept it.

Q. That was the practice you followed for National in California whenever service was attempted upon it? A. Yes. Well, to take it to Mr. Skouras if he was present and

Mr. Cox was not present; to take it to Mr. Cox if possible, if he were present, so as to avoid inconvenience to Mr. Skouras.

I think Mr. Alan May, the assistant treasurer of National Theatres Corporation, may have been served in one action. He was always available.

[444] And then possibly in one or two cases I accepted service for reasons which I do not recall. Perhaps both Mr. Skouras and Mr. Cox were going to be out of town and I checked with one or the other, on the call from the Marshal, that it was agreeable to accept service for them.

Q. In other words, the practice followed was if Mr. Skouras or Mr. Cox were present you would take the Marshal in to them; if they were not available you, yourself, would accept service for National? A. You can't call it a practice. I am trying to tell you the fact. Whether it is a practice or not would depend on your interpretation.

The Marshal always called me in advance, Mr. Spanos, to find out whether or not I would be present and help him in the performance of his duties.

Q. Do you recall the case of Berman versus Twentieth Century Fox Film Corporation? A. I do.

Q. Do you recall how service was attempted on the National in that case? A. I don't recall particularly what was done.

* * *

[445] Q. For the purpose of refreshing your recollection, Mr. Bertero, I show you—— A. You didn't let me finish my answer.

Q. I am sorry. A. In my deposition you, I think, made it a point Mr. Brooks was the Marshal who served the peti-

tion upon me as an officer of Fox West Coast Theatres Corporation and as also an officer of several subsidiary corporations which were made defendants in the action.

I know Mr. Brooks served me in two or three cases and then there is another Marshal I became familiar with who always served Fox West Coast and the subsidiary companies by coming to me with the papers.

* * *

[448] Q. In other words, Mr. Bertero, in the Berman case you didn't follow the practice you have previously described of facilitating service upon National whenever it was attempted? A. I am puzzled by the fact that Brooks said he was unable to find National Theatres Amusement Company, Incorporated, within his district, it having a very prominent sign on the building, a telephone listing, Mr. Harry Cox was present. Mr. Cox might have been in New York in May of 1947, but I don't think that both he and Mr. May were simultaneously out of town. I don't know the whereabouts of Mr. Skouras in May of 1947, but National Amusement was certainly within the district and prominently doing business.

Now, it could very well be that neither Mr. May nor Mr. Charles P. Skouras and Mr. Cox were in town, and he was informed, but I don't have any recollection of the matter.

Q. You say it puzzles you, Mr. Bertero, that the Marshal couldn't find National Theatres Amusement Company? A. It certainly was within the district.

Q. You are not surprised that they couldn't find the National Theatres Company? A. I am not surprised? He could have found Mr. Skouras, [449] if Mr. Skouras within the district, he could have found Mr. Skouras or Mr. Cox

or Mr. May, all of whom were officers of National Theatres Corporation.

* * *

[450] Q. Now, Mr. Bertero, did National conceal its presence in California during the period 1930 to 1952? A. In what way conceal, Mr. Spanos?

Q. Did it attempt to keep information as to its presence in California from becoming public? A. I think Mr. Charles Skouras was written up frequently in national magazines, and so forth, as the co-manager of National and its properties; that is my recollection. I don't know of any efforts. Everybody knew that he was a [451] very prominent person in the affairs of National Theatres Corporation, and I think that was known throughout the breadth of the land.

Q. Mr. Bertero, will you answer my question, yes or no?

Mr. Pride: I submit he has answered.

The Court: I think he has.

Q. Mr. Bertero, have you ever heard Mr. Skouras deny under oath that he was in California for National Theatres, Mr. Charles P. Skouras? A. I have no recollection of that matter.

Q. It is Mr. Charles Skouras you were talking about in your previous answer; isn't it? A. Yes, I so said.

Q. Hasn't he in your presence in a procedure in which you were attorney of record denied that he was in California as an employee of National Theatres? A. I have no recollection of the matter.

Q. Do you remember the case of Sturdivant versus National? A. Yes, I do.

Q. Were you active in that case? A. In the sense that I helped to prepare various facts in the case; we were independently represented by counsel.

Q. And weren't you one of the counsel of record in that case? A. I have no recollection that I was. I think the firm of O'Melveny & Myers were.

Q. For purposes of refreshing your recollection, [452] Mr. Bertero, I hand you a transcript of the deposition taken in that case. A. What does this refresh my recollection to?

Q. Does it reveal that you were the attorney of record in that case? A. It says this: "For certain defendants, O'Melveny & Myers, by Homer I. Mitchell, Esq., and W. B. Carman, Jr., Esq.," both of whom are members of the firm, and John B. Bertero, Esq.

I don't recall that I was counsel in that case at all.

Q. Do you recall whether you participated at all in this deposition by way of making objections? A. Well, I'm fairly positive if I were present at the deposition I did not make objections.

Q. Well, do you remember now that you see this document before you that you were present at the deposition? A. I attended Mr. Skouras' deposition, yes.

* * *

A. I have a faint recollection to that effect.

Q. Now, do you have any recollection at all of Mr. Skouras testifying under oath in this deposition in your presence that he was not in California on the business of National Theatres? A. I have no recollection of any [453] testimony in that case.

Q. Now, do you recall, Mr. Bertero, that in that same proceeding the deposition of Mr. H. C. Cox was taken? A. I remember that Mr. Cox's deposition was taken.

Q. And do you recall in the testimony of Mr. Cox—— A. I know nothing about his testimony, I don't remember ever reading it, and I am sure that I was not present when it was taken.

Q. Do you recall that it was testified in that case that the position of Charles P. Skouras, who was one of the defendants in that case, was that the defendant in this case, National, did not do any business in California? A. I recall at the time of my deposition you showed me papers which indicated attempted service was made upon Mr. Laurence Peters, the plaintiff wanting to take his deposition as an adverse witness, and the plaintiff made the contention that in as much as Mr. Peters was an officer of a subsidiary company, that they could take his deposition as an officer of National and as an adverse witness, and a stipulation of some character was shown to me by you which was put into that record for the purpose of getting a decision of the Court on the question whether or not service upon Mr. Peters, who was not an officer of National Theatres Corporation, was service, good service, and that his deposition could be taken as an adverse witness.

[454] Q. On your direct testimony, Mr. Bertero, you testified that the question of whether or not National Theatres transacted business in California or was doing business in California had never been litigated; do you recall whether or not—— A. Did I say that just that way, Mr. Spanos?

Q. I think that was the substance and effect of what you said. I don't have the transcript here, but I think that is what you said. A. I think I said I can't recall a case where the issue was ever litigated in California.

Q. Now, was that issue litigated in the Sturdivant case? A. No, I think the only issue that I remember was—based upon the papers you showed me, was whether or not Mr. Peters could be served with process as an officer of a subsidiary company, and that be effective service upon National Theatres Corporation, and the Judge ruled adversely. I say that based upon what I saw.

* * *

[458] Q. Now, Mr. Bertero, at the time that you had your conversation with Mr. Johnston some time, I think you fixed the date about 1947—— A. I did, and it may have been 1948, somewhere around that period.

[459] Q. Can you tell us whether or not either you or Mr. Johnston considered tax problems in deciding whether or not National Theatres should avail itself of the defense of venue and jurisdiction? A. I have no independent recollection of the conversation with Mr. Johnston. I am inclined to think that it would have been in the forefront of my mind, if it were on state franchise taxes.

Q. Do you have any recollection of any conversation with Mr. Johnston about this subject matter during the period subsequent to 1947, where either you or Mr. Johnston considered the tax problem, either the first conversation you had with him or a subsequent conversation you had with him? A. Whether we considered the tax problem?

Q. Yes, in connection with this matter of what National should do, what position it should take about whether it was doing business in California? A. No, I have no independent recollection of it.

Q. And you didn't so testify in your deposition, did you? A. I don't know what I testified to.

Q. Were you in court yesterday when Mr. Caskey testified? A. Yes, I was.

Q. And you heard his testimony? A. Yes.

Q. Now, did his testimony refresh your recollection so as to permit you to mention in your direct examination that [460] tax considerations were paramount in causing you to include this defense and then waive it? A. No.

* * *

[470] Q. Did there come a time, Mr. Bertero, when you had a subsequent discussion with Mr. Johnston; isn't that correct? A. That is right, I remember a conference with Mr. Johnston.

Q. And can you fix the time of this second conference? A. No. I remember the second one, but I can only fix it in this respect: It became important to Mr. Johnston to know the wishes of his client, that is as to whether or not they wanted to litigate the issue whether or not National was transacting business in the State of California, and at that conference it was decided not to litigate the issue, and that is the only reason I remember the conference.

Q. Can you fix the date of the conference in relation to the decision in the Sturdivant case? A. I tried to, I am not sure that I can. It seems to me that it was two or three years which had elapsed after the first conference—well, the conference relates to a case on trial in which National, as a result of the conference, appeared and defended.

Now, I can't place that case. If you can tell me that case and the date of trial, I will tell you somewhat the period when the conference took place.

[471] Q. You say the only way you can fix the date of this second conference is in relation to a case in California

in which National appeared and defended on this issue? A. Not defended on the issue, where we had decided not to.

The Court: He said that that issue was never litigated.

Can't we have that as the testimony of this witness?

Q. Now, Mr. Bertero——

The Court: I am asking you a question.

Mr. Spanos: Yes, sir, that is his testimony.

* * *

[487] Q. During the period 1930 to 1942, Mr. Bertero, do you know whether or not the defendant in this case had any departments officed in California: Film buying department, advertising department, legal department, any departments of that type. A. From 1930 to——

Q. 1942. A. Well, you have shown in evidence here —Oh, the defendant, National Theatres, ignoring——

Q. Yes. A. —ignoring National Theatres Amusement Company.

Q. Yes. A. Mr. Skouras was co-manager of all the National interests here, and so he performed his functions as co-manager. And Mr. Sullivan performed, under his contract—that one you showed me—after 1935 although he continued residence in Los Angeles. There were several individuals who came out from New York, but I don't know what payroll they were on.

* * *

[489] Q. Now, during all this period, 1932 to 1942, you were working in close association with Mr. Skouras?

The Court: Yes. He has said that a half dozen times.

* * *

[496] Q. Mr. Bertero, did you take any steps since the date of your deposition on September 28th and 29, 1955, to refresh your recollection as to the matters involved in your deposition, any of the matters? A. No. I read the deposition on the plane coming east, and I have discussed some phases of this case with my counsel since I have arrived here.

Q. Have you, for the purpose of refreshing your recollection, had any discussions with anyone other than your counsel? A. No.

Q. Have you examined any documents other than documents that have been shown to you in the court room here? A. I saw some documents in connection with the case of Jensen and Von Herberg, the 1932 action. I saw a copy of a dismissal of that action.

Q. You saw a copy of a dismissal of that action? A. A copy of a dismissal of that action by the plaintiff in California.

Q. Now, Mr. Bertero, I want to direct your attention to a conversation with Mr. Cox that you testified to on page 405 of your testimony in this case as part of your direct [497] examination, and for the purposes of calling that conversation to your mind I just read from your testimony.

> "I do recall a conversation, not in detail, with Mr. Cox, about the allegation to the effect that we were transacting business in the State of California, and the adoption of the position that we didn't want to have on the public record any admission that we were transacting business in the State because of the possible use by the State Franchise Tax authorities as an admission that we were transacting business."

Can you fix the time, Mr. Bertero, of that conversation, approximately? A. No. I had a number of conversations with the treasurer of National Theatres about that subject.

Q. Do you recall who else was present at any of those conversations? A. No.

Q. Now, can you fix the time of those conversations in relation to the case of Jensen versus Von Herberg or Jensen and Von Herberg against WESCO? A. I am positive I had no conversations with Mr. Cox then because that case was filed in Los Angeles in 1932, according to the information you gave me at my deposition, and I don't think I met Mr. Cox until 1935.

Q. Can you fix the conversations you had with Mr. Cox [498] about this subject in relation to the first meeting that you had with Mr. Frank Johnston, which was fixed in approximately 1947? A. No. I had conversations with Mr. Cox in the course of his and my affairs and the problems of National from time to time and among those discussions would be matters relating to taxes and other routine matters of the corporation.

Q. Now, do you recall whether Mr. Frank Johnston was present at any of the conversations you had with Mr. Cox? A. I am sure he wasn't.

Q. You are sure he was not? A. I don't recall any such conversation where Mr. Cox and Mr. Johnston were present.

Q. Mr. Bertero, was the matter of liability for state taxes that came up in your conversation with Mr. Cox one of the factors that you considered in the first discussion that you had with Mr. Frank Johnston in 1947 relative to whether or not National should plead as a defense that it was not doing business in California and had no officer

or agent there? A. Mr. Spanos, I stated numerous times yesterday I have no recollection of that conference of some years ago. I can't tell you what was said. I don't recall it.

Q. The question that was asked of you on direct and to which you gave this answer, Mr. Bertero, on page 405 was as [499] follows:

> "Q. My question, Mr. Bertero, was directed to the specific eleven cases which represent excerpts from plaintiffs' exhibits in this case and they are all in this period of 1948 to 1951. The case which you mentioned, the Fanchon & Marco case, is not in these cases and, therefore, I am directing your attention solely to these eleven cases and I am asking you if you know what were the circumstances which led to the interposition of the defense that was pleaded in each case?"

Now, as a circumstance leading to the interposition of the defense, you gave the answer about the conversation with Mr. Cox.

Was that a circumstance that you mentioned to Mr. Frank Johnston? A. I don't recall. Mr. Spanos, in every one of these eleven cases, our parent company, Twentieth Century-Fox Film Corporation, was named a defendant and appeared and in every one of these cases Twentieth Century-Fox was named a defendant in practically all of them, with maybe one or two exceptions, and that very large corporation was served, appeared and defended.

The appearance of National had no—whether it appeared or not had no consequence as far as the financial condition of the corporation was concerned. The parent was sued and one [500] of its principal subsidiaries was sued.

Obviously the state tax problem, the franchise tax problem, must have been paramount in mind but I can't

relate any conversation with anyone regarding the problem, it has been so many years ago.

Q. Mr. Bertero, was your discussion with Mr. Cox in connection with filing these answers in these cases? A. I have had many discussions with Mr. Cox about the—about National Theatres Corporation and I don't know whether I had any discussion with him about the filing of the answer in these cases. I can't remember. I may have had. I don't know.

Q. I want to call to your attention the testimony given by you at page 211 of your deposition.

> "Q. Now, do you recall whether or not you have, from the date of the two discussions with Mr. Johnston down to this date, discussed this matter," namely, of these answers, "with anyone other than Mr. Johnston?" "A. I have no recollection of discussing it with anyone else."

Now, are you telling the Court today that you have a recollection you discussed this matter with Mr. Cox?

> Mr. Pride: I submit you should identify what the matter is, Mr. Spanos.
>
> [501] Mr. Spanos: The matter of the two discussions.
>
> Mr. Pride: I think you were questioning him about the answers in these cases.
>
> Mr Spanos: Pardon me?
>
> Mr. Pride: I think you were questioning him solely about the answers in these cases.
>
> Mr. Spanos: That is right, and I want to know now whether or not he recollects discussing the answers in these cases with Mr. Cox.
>
> The Witness: I have no recollection specifically of any discussion with Mr. Cox. I had numerous

discussions on many problems, including state franchise taxes, with Mr. Cox.

* * *

[502] Q. Mr. Bertero, were you present at the trial of the James case? A. I testified at, oh, probably four or five [503] days in that case, yes.

Q. Have you examined the pleadings filed in the James case? A. I am sure I read the complaint and I may have read the answer, but I have no recollection. It would be my practice to read the complaint.

Q. Now, on your direct examination you testified, at page 400, "National Theatres Corporation, through its counsel, did not urge the defense but waived it and went to trial."

Did you hear any counsel for National Theatres Corporation, in the course of the proceedings in the James case, waive this defense? A. I can be wrong there. It is my understanding at the moment that National Theatres Corporation was a defendant in that action and that it was represented in court by counsel who also represented Fox West Coast Theatres Corporation, and Principal Theatres, Inc., one of the subsidiaries of National Theatres Corporation, but if National Theatres Corporation was not a defendant in that action, then there was no judgment against National Theatres Corporation. But I have assumed all along that National Theatres Corporation was a defendant.

Q. I think the record in the case indicates National Theatres Corporation was a defendant. Now, will you testify today whether or not you heard any counsel for National [504] Theatres Corporation waive this defense during the proceedings in the James case? A. I was only present in the court room as a witness on the stand, and nothing of that kind transpired while I was a witness on the stand.

Q. Did you see any pleadings whereby the defense was waived in writing? A. No.

Q. So—— A. That is, I don't recall having seen any, but I heard Judge Westover refer to counsel for National Theatres Corporation at the table, and I heard that counsel making objections in conducting the defense.

Q. It is on the basis of that that you now testify National Theatres Corporation, through its counsel, waived the defense? A. All I state is that, and you have refreshed my recollection as being accurate, that National Theatres Corporation was a served defendant in the action and defended on the merits.

* * *

[516] Q. I want to call your attention to your testimony on Page 230 of your deposition when you were being questioned by Mr. Pride.

Well, in order to make it clear, I have to begin with a question on Page 229.

> "Q. Now, in arriving at your decision in that respect, what was the determination or the basis for the determination which you reached as to waiving, abandoning, or not pressing that defense?"

Then there are some objections, and Mr. Pride explains it on Page 230:

> "I am asking him if there was a reason that they determined upon which caused them to take the action which they did."

Then there are some more objections.

Then, the witness:

> "A. The decision was made that we could not prevail upon that defense if it were raised and litigated."

John B. Bertero—Redirect

Now, does that refresh your recollection, Mr. Bertero, as to the basis on which Mr. Johnston and you ar- [517] rive at the second decision to abandon this defense? A. I feel confident that that was ample reason not to litigate the issue, and also from the financial point of view it was of no consequence.

* * *

[533] *Redirect Examination by Mr. Pride*:

Q. Mr. Bertero, in this exhibit here of the plaintiffs which relates to the Jensen and Von Herberg suit, Exhibit No. 3, you testified to the fact that that suit was voluntarily dismissed by the plaintiff.

I ask you if you find the order of dismissal in that?

The Court: Is it there?

Mr. Pride: It isn't, your Honor, it is not there, and I wish to complete the filing.

By Mr. Pride:

Q. I show you this paper, Mr. Bertero, and ask you if you recognize it and if it were filed in that action? A. Yes, it is a copy of a dismissal filed with the Clerk of [534] the Superior Court of the State of California, County of Los Angeles, and it appears to have been filed on November 9, 1932. The handwriting thereon is mine.

Q. And who has signed it? A. The dismissal is signed by the attorney for plaintiffs, which is the practice in that County.

Q. Thank you.

Mr. Pride: I offer it in evidence.

* * *

John B. Bertero—Recross

Q. Mr. Bertero, there have been introduced in evidence in this case, as one exhibit, the minute books of WESCO, of National Theatres, up to 1942.

I show you these minute books from 1942 to 1949, and ask you if you are able to identify them as the official corporate minutes of National Theatres? A. They were among the records of National Theatres Corporation in Los Angeles, and at your request I sent them East, and those are the books that I sent you.

Mr. Pride: I offer them in evidence as a continuation of Exhibit A.

(Books received in evidence as Defendent's Exhibit A-2, as of this date.)

[535] The Court: They will be received, Mr. Kostelanetz, under the same restriction as apply to Exhibit A.

Mr. Kostelanetz: Very good.

Your Honor, just for purposes of clarification.

Recross Examination by Mr. Kostelanetz:

Q. Mr. Bertero, they are New York books, which, as I understand, went to Los Angeles in connection with some litigation there. You didn't mean to imply that you kept them in Los Angeles from 1942 on? A. The office of National Theatres was removed in September, 1952 to Los Angeles, and all the records of that corporation are now in Los Angeles.

Q. But they were originally New York records? A. They were kept in New York until about September of 1952.

Q. This paper is labeled "Dismissal in the Superior Court of the State of California."

Now, I would just like to ask one or two questions about that.

Mr. Bertero, this proposed offer of dismissal reads:

"Filed November 9, 1932," and the initials "J. B. B.," those are your initials?

A. I stated that is my handwriting on there, Mr. Kostelanetz.

[536] Q. This is your copy, is that your office copy? A. That is right, yes, but I think it also has the handwriting of the attorney for the plaintiff, it being a practice to secure dismissals in duplicate and filing the original, but this would be my office copy.

Mr. Pride: I will offer that in evidence.

(Dismissal received in evidence as Defendant's Exhibit Q, as of this date.)

* * *

[538] The Court: Yes, sir.

Mr. Pride: Your Honor, we have decided we are not going to call any more witnesses in this case. I do have a few matters of a formal nature in connection with a few exhibits that I would like to have marked.

At the time when Mr. Bertero was testifying concerning the action instituted by Mr. Gumbiner——

The Court: Yes.

Mr. Pride: —back in 1935——

The Court: Yes.

Mr. Pride: —your Honor indicated you anticipated there would be some evidence as to Mr. Gumbiner's interest in the two corporations which are the plaintiffs here.

The Court: Yes.

Mr. Pride: And I, therefore, now offer in evidence certain interrogatories propounded to the plaintiff, Gumbiner Theatrical Enterprises, and filed in this court in one of these actions on August 17, 1953 and also the answer of Gumbiner Theatrical Enterprises to those interrogatories, which is also filed in the record here—was filed on January 27, 1954—which [539] answers to interrogatories establish that Mr. Gumbiner——

The Court: You are not offering what you——

Mr. Pride: I was just adverting to their relevancy, your Honor, that's all. If that be unnecessary, why, I will ask to have these marked at this time. I offer them in evidence and ask to have them marked at this time.

The Court: The originals are here?

Mr. Pride: They are in this file, your Honor. We have marked our office copy.

The Court: If you want to mark the office copy, that will serve my purpose.

Mr. Pride: Yes, that is what I thought.

Mr. Kostelanetz: Could I see them before its receipt? Could I look at them?

The Court: Yes.

Mr. Pride: They emanated from your office, Mr. Kostelanetz.

And I also——

The Court: This is Exhibit R. Give Mr. Kostelanetz a chance to examine the exhibit.

Mr. Pride: Yes, your Honor.

Mr. Kostelanetz: If your Honor please, our objection is not to the competence of the paper, of course, but exclusively to the materiality and the

[540] relevancy in relation to the Statute of Limitations in issue which we are trying here.

The Court: You had better let me see the papers.

I admitted the record in the Gumbiner complaint against a number of defendants.

Mr. Kostelanetz: Yes, that was subject to correction, if your Honor recalls.

The Court: Yes, I will admit this answer to the interrogatories.

Mr. Pride: Which I might say, your Honor, shows the shareholdings——

The Court: That isn't necessary.

Mr. Pride: Yes, I understand.

The Court: That is R.

(Interrogatories and answers to interrogatories, Gumbiner Theatrical Enterprises, Inc., was marked Defendant's Exhibit R and received in evidence, as of this date.)

Mr. Pride: And with respect to the second case here, the Bertha Building Company case, I make the same offer with respect to interrogatories propounded in that case and the answers thereto. I offer them.

The Court: That is a separate interrogatory?

Mr. Kostelanetz: The other plaintiff.

May I look at that, your Honor?

[541] I presume, your Honor, my objection and your Honor's ruling would be the same with regard to this paper?

The Court: Yes.

Mr. Kostelanetz: However, I do want to call your Honor's attention that at the time that the causes of action arose or about that time, the stockholder was the Bank of America National Trust & Savings Association.

The Court: I will take it. I take note of that.

Mr. Pride: But may I also, so that the dates will be clear, direct attention to the fact that on the date when this action was settled as testified by Mr. Bertero and a stipulation of discontinuance and order of dismissal with prejudice was entered by the Court in that 1935 action, these answers show Mr. Gumbiner owned all the stock of both corporations.

The Court: That is the only point I am interested in.

(Interrogatories and answers to interrogatories, Bertha Building Company, were marked Defendant's Exhibit S and received in evidence, as of this date.)

* * *

[549] The Court: Then you rest. Does the defendant rest?

Mr. Pride: Defendant rests, your Honor.

I would like to make one last request here. In connection with the papers that have been given to your Honor—and I fear perhaps too many have been given by us at least—there is a brief that we submitted in the first instance concerning our contentions, that you ruled you would not hear, with respect to the judgment on the pleadings and I simply would request, your Honor, that that might be considered a brief in support of our position after the evidence in so far as it is applicable to the issues you have tried.

The Court: All right.

* * *

Mr. Kostelanetz: If your Honor please, pursuant to the subpoena duces tecum served on National

Theatres Corporation, I respectfully request items listed in that [550] subpoena under 2, 3, 4, 6, and 19 which deal with the State of New York.

Your Honor has already ruled yesterday afternoon and this morning with regard to papers and documents on the question of doing business in California.

Now, may I say my request is for like papers with regard to the State of New York.

Mr. Pride: As far as New York is concerned, Mr. Kostelanetz, that was the man you had here with the file which you looked over, having all the papers relating to qualification in New York and as to which you said you wanted one letter which was read into the record.

We have nothing further.

Mr. Kostelanetz: That was a man from the State Tax Department, your Honor.

Mr. Pride: That is right.

Mr. Kostelanetz: And not from National Theatres. Am I to understand counsel's statement that the corporation has no papers under Items 2, 3, 4, 6, and 19 with regard to the State of New York?

Mr. Pride: 19. I assume that what has been said as to the contents of that file as containing everything that the company might have on the matter of course does not apply to Item 19 which calls for any writings [551] containing legal opinions relating to the doing or transacting of business in the State of New York. I submit, your Honor, that legal opinions addressed to the corporation would not be—should not be produced.

The Court: They would not be admitted here.

Mr. Pride: That is right.

Mr. Kostelanetz: Now, as I understand it, then, the answer is with regard to Items 2, 3, 4, and 6 that the corporation simply does not have these papers and, therefore, cannot produce them. Is that right?

Mr. Young: As far as cancelled checks are concerned you asked for that and we told you we didn't have any.

As far as papers submitted to the State of New York, you had Mr. Ross here, and you examined it and then we were allowed to examine it and there is not a single scrap of paper that was not in that file and about ten times as many more than we were able to come up with. They were all in that file. I can give him duplicates of those letters. That's all.

Mr. Pride: Has Mr. Kostelanetz seen in that file the papers that we have in our file?

Mr. Young: He hasn't asked for those.

Mr. Pride: Are there copies of papers Mr. Kostelanetz has seen in the files which we have?

[552] Mr. Young: Very few. A half dozen. Six or ten, maybe.

Mr. Kostelanetz: If your Honor please, I respectfully submit to the Court I have no understanding of just what it is—what position counsel takes. If they have these papers I respectfully ask to have them produced.

The Court: Have you those papers?

Mr. Young: We have some, yes, your Honor.

The Court: Give them to Mr. Kostelanetz.

Besides that, what else have you, Mr. Kostelanetz, by way of rebuttal, while they are looking for such papers as they have?

Do you have them?

Mr. Pride: Sir?

The Court: Do you have them?

Mr. Pride: Yes. (Counsel hands documents to Mr. Kostelanetz.)

Mr. Kostelanetz: Possibly I can help counsel a little bit.

Mr. Pride: Yes.

Mr. Kostelanetz: In answer to interrogatories, certain letters are listed under answer 205-C.

Mr. Pride: Unless they were in the file that was produced here yesterday. We understood, Mr. Kostelanetz, [553] that when you saw that file and we let the man go with it and you took out this one letter, that that was the best source of this business of what was filed with the State of New York. And I understand that letter, which you read in the record, you did offer in evidence. Is that correct?

Mr. Kostelanetz: If your Honor please, what was produced by the State of New York has nothing to do with this subpoena.

The Court: Can you give him any papers that you have?

Mr. Pride: Yes. I have given some.

The Court: Look for any and all.

Mr. Pride: There they are (indicating).

(Recess had)

Mr. Kostelanetz: If your Honor pleases, I would like to have marked as one exhibit for identification, and not in evidence, all the papers that were produced in response to my request with relation to Items 2, 3, 4, and 6 of the subpoena duces tecum.

I would like to offer in evidence a letter of December 14, 1949, from—I presume W. F.——

Colloquy

Mr. Pride: Mr. Fisher is W. F., his name is William Fisher, and he is an associate in our office.

Mr. Kostelanetz: It is addressed to Alfred G. [554] Muller of Prentice-Hall Corporation, and is dated December 14, 1949, and it encloses statement and designation for qualification of National Theatres Corporation, and it encloses the $100 filing fee and tax form 241-CT.

Now, I specifically ask, your Honor, for the production of the retained copy of tax form 241-CT. I have a blank copy of 241-CT.

Now, the reason why I ask for the production of the retained copy is that this copy has, or rather the form provides for a statement and oath "as to whether the corporation had an officer or agent or representative in New York"—and so on—"prior to the date of the making of application for permission to do business in the State of New York."

The Court: Have you such?

Mr. Pride: No, your Honor.

Prentice-Hall has, as you know——

The Court: I just want to know whether you have got it.

Mr. Pride: No, no.

The Court: Where would the original be?

Mr. Pride: The only place I could know of would be, well, the original would be filed with the State Tax people, your Honor, and must have been in its folder.

[555] The Court: Do you state in answer to the subpoena duces tecum that you are unable to produce that paper; is that right?

Mr. Pride: That is right.

Colloquy

The Court: Then I can't do anything about it.

Mr. Pride: I submit it appears on its face that it is in the file, in the Tax Department file.

Mr. Kostelanetz: If your Honor pleases, the paper was not in the Tax Department file.

I would like to have form 241-CT marked for identification.

The Court: All right.

Now, you have offered some papers for identification and you have offered a letter in evidence?

Mr. Kostelanetz: Of December 14, 1949.

The Court: Then please offer them.

Mr. Kostelanetz: The letter of December 14, 1949 deals with——

The Court: Just give him the paper, he will mark it.

(Letter received in evidence as Plaintiffs' Exhibit 35, as of this date.)

Mr. Kostelanetz: And then all the papers produced in response to the request I would like to have stamped as one exhibit for identification.

[556] The Court: All right.

(Papers produced in response to request marked for identification as Plaintiffs' Exhibit 36, as of this date.)

Mr. Kostelanetz: Now I would like to have marked for identification this Form 241-CT.

(Form 241-CT marked for identification as Plaintiffs' Exhibit 37, as of this date.)

* * *

Defendant's Exhibit A-1

RESOLVED that the President, any Vice President, or counsel for the Corporation, be and hereby is authorized, empowered and directed, to retain, until further notice, Mr. Alfred Wright of Los Angeles, California, to prepare and file answers in the actions instituted respectively by H. L. Gumbiner and Arthur and/or Louis L. Bard in the District Court of the United States for the Southern District of California, Central Division under the so-called Sherman Anti-Trust Act, and in the action instituted by said Arthur and/or Louis L. Bard in the Superior Court of Southern California, Los Angeles County, charging conversion of certain equipment used or useful in the operation of the Colorado Theatre, Pasadena, California; and generally to conduct on behalf of said Trustees in Bankruptcy of Fox West Coast Theatres, Fox West Coast Theatres Corporation, and such of the said corporations' subsidiaries as are named as defendants in such actions, the defense of said actions.

Extract from Minutes
Feb 14, 1935

Defendant's Exhibit B

CONFORMED COPY

New York, N. Y.,
December 5th, 1935.

MR. JOHN J. SULLIVAN,
Los Angeles,
California.

Dear Sir:

1. We hereby employ you, subject to all the terms and conditions of this agreement, for a period of five years from the date hereof.

2. You hereby accept such employment, upon all the terms and conditions of this agreement, and during the term hereof agree to devote your entire time exclusively to such employment and to perform the services herein provided and contemplated to be performed by you faithfully, diligently and to the best of your ability.

3. You shall assist, under the supervision and direction of our board of directors and/or the Chairman of said board and/or our president and/or our executive vice-president from time to time, or of the board of directors and/or the Chairman of said board and/or the president and/or the executive vice-president from time to time of any of our associated companies to which our right to all or any part of your services hereunder may be assigned (our board of directors or the appropriate board of directors of any such associated company, being hereinafter referred to as the "Board of Directors"), or of any person or persons designated by the Board of Directors, in the

Defendant's Exhibit B

purchasing and/or leasing and/or obtaining and booking of motion picture film, stage talent and other theatrical productions and entertainments for exhibition in such of the theatres and theatrical enterprises now or hereafter owned, leased, controlled or operated by us or any of our said associated companies. You shall act only with such powers and in such capacity as the Board of Directors may determine and your activities shall be subject at all times and in all respects to the control and direction of the Board of Directors and of any person or persons designated from time to time or at any time by the Board of Directors, and to the provisions of our by-laws and certificate of incorporation and those of our said associated companies, and to all resolutions and regulations adopted by the Board of Directors. You may (but need not) be elected a director and/or officer of our Corporation or of any of our associated companies and, if elected, you agree to act as such.

The phrase "associated company" as used in this agreement shall be deemed to mean any direct or indirect parent or subsidiary of our Corporation, or any direct or indirect subsidiary of any such parent, or any company associated or affiliated with us or controlled by us or with which we may at any time have, directly or indirectly, any managerial or service contract or arrangement.

* * *

7. For your services hereunder we agree to pay to you, and you agree to accept, as full compensation for such services, during the term of this agreement, a weekly salary at the following rates, for the following periods, payable on any day of the succeeding week:

(*a*) For the first year, the sum of $560 per week;

(*b*) For the second and third years, the sum of $600 per week; and

Defendant's Exhibit B

(*c*) For the fourth and fifth years, the sum of $650 per week.

All services performed by you in any capacity for us or for any of our associated companies shall be rendered without any further salary or compensation other than that above specified and if we or any such associated company shall pay you any other salary or compensation, the same shall be deducted from, and to that extent reduce, any sum or sums payable to you hereunder, and any such sum or sums shall also be reduced by the amount of any claims or set-offs on our part or on the part of any such associated company against you, howsoever arising.

* * *

10. All notices and communications hereunder from us to you shall be deemed to have been duly given if in writing and shall be deemed effective if sent by registered mail to you at 1609 West Washington Blvd., Los Angeles, California, or at such other place as you shall designate in a written notice to us, and all notices and communications hereunder from you to us shall be deemed to have been duly given if in writing and shall be deemed effective when sent by registered mail to us at 19-21 Dover Green, Dover, Delaware, or at such other place as we shall designate by a written notice to you.

* * *

12. This agreement, having been delivered in the State of New York, shall be deemed to be a New York contract with the intention that it be interpreted in accordance with the laws of the State of New York and that the performance hereunder be governed by the laws of the State of New York the same as if it were to be fully performed in said State and that this agreement shall be enforced accordingly.

Defendant's Exhibit B

13. It is understood and agreed that you shall spend as much time in the City of New York or elsewhere as we deem necessary or desirable in connection with the performance of your duties hereunder. In the event, however, that you shall be required, without your consent, to spend more than six months in any one calendar year outside of the City of Los Angeles, you shall have the right to terminate this Agreement at the end of such calendar year by serving written notice thereof upon us at least thirty days prior to the expiration thereof.

We agree to pay, or cause to be paid, to you all reasonable expenses incurred by you in the performance of your duties hereunder while outside of the City of Los Angeles and its immediate vicinity.

Your signature at the foot hereof, under the word "Accepted", together with our signature at the foot hereof, will make this a valid, binding and enforceable agreement between us, it being understood that this agreement may be executed in any number of counterparts, each of which shall be deemed to be one and the same original, valid, binding and enforceable agreement.

Very truly yours,

NATIONAL AGENCY CORPORATION,
By SPYROS P. SKOURAS
President

[CORPORATE SEAL]

Attest:

JOHN P. EDMONDSON
Secretary

Accepted:

JOHN J. SULLIVAN [L. S.]

Defendant's Exhibit B

KNOW ALL MEN, that, in consideration of the acceptance and delivery of the foregoing agreement by JOHN J. SULLIVAN, the undersigned does hereby guarantee that, if said John J. Sullivan shall at all times perform all duties and obligations on his part to be performed under said agreement, NATIONAL AGENCY CORPORATION will pay all sums due said John J. Sullivan thereunder, subject, however, to the terms and conditions thereof.

Dated New York City, N. Y.
December 5th 1935.

NATIONAL THEATRES CORPORATION,
By SPYROS P. SKOURAS
Exec. Vice-President.

[CORPORATE SEAL]

Attest:

JOHN P. EDMONDSON
Secretary.

Defendant's Exhibit E

(Part)

CONSENT OF GUARANTOR

In consideration of the reductions in rental for the months of March to August 1933, both inclusive, indicated in the foregoing Modification Agreement (which is attached hereto and expressly made a part hereof and which is hereinafter sometimes referred to as the "Agreement"), and for other valuable considerations receipt whereof is hereby acknowledged by the undersigned, and concurrently with the execution of said Agreement, in consideration thereof, and as a part of said transaction,

Wesco Corporation, a Delaware corporation, with an office and place of business in the City of New York, State of New York, the Guarantor named in recital "D" of said Agreement (hereinafter sometimes referred to as the "Guarantor") does hereby approve, confirm and consent to all of those certain assignments and transfers indicated in recitals "B", "C", "G", "H", "I", and "J" of said attached Agreement; and does hereby approve, confirm and consent to each, every and all of the covenants, conditions and agreements contained in said attached Agreement;

And the Guarantor does hereby also unconditionally guarantee the due and punctual payment by the Fox Rialto Theatre Corporation, the assignee of said Lease, of each, every and all installments of rent provided to be paid by the Lessee in said Lease, as so amended, and the faithful performance by said assignee corporation of each, every and all of the covenants, conditions and agreements in said Lease contained, as so amended, obligatory upon the Lessee, all in accordance with the terms of said original Guaranty attached to said original Lease and particularly

Defendant's Exhibit E

described in recital "D" above, with like effect as though said Lease were originally written as now amended; and said Guarantor does hereby agree that nothing contained in the attached Agreement shall in any way release, or be construed to release, the said Guarantor from its said guarantee of said Lease as modified.

IN WITNESS WHEREOF the said Wesco Corporation has caused this instrument to be executed by its officers thereunto duly authorized and its corporate seal to be affixed hereto, this 28th day of August, 1933.

WESCO CORPORATION

By S. P. SKOURAS
President

By JOHN P. EDMONDSON
Secretary

Defendant's Exhibit E

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 28th day of August, 1933, before me, MARGARET J. CLANCY, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared S. P. SKOURAS, known to me to be the President and JOHN P. EDMONDSON, known to me to be the Secretary, respectively, of Wesco Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the same on behalf of said corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial seal the day and year in this Certificate first above written.

MARGARET J. CLANCY
Notary Public in and for said
County and State

Approved as to form:

GILDRED BUILDING COMPANY

By PHILIP L. GILDRED
President

By L. LIERD
Secretary

Approved as to form:

FOX RIALTO THEATRE CORPORATION

By CHARLES A. BUCKLEY
President

By ALBERT W. LEEDS
Secretary

Defendant's Exhibit F

THIS AGREEMENT dated this 19 day of January, 1932, by and between WESCO CORPORATION, a Delaware corporation, party of the first part, for itself and its subsidiary and controlled companies (singly and collectively sometimes hereinafter referred to as "Wesco"), and CHARLES SKOURAS, SPYROS SKOURAS and GEORGE SKOURAS, parties of the second part (sometimes hereinafter referred to as the "Managers"), WITNESSETH:

WHEREAS Wesco owns and/or controls, directly or indirectly, through stock ownership or otherwise, a number of companies and enterprises owning and/or operating theatre and other properties, which said companies and enterprises and their respective relations to Wesco are substantially as set forth on charts annexed hereto and marked "Schedule A", and which said companies and enterprises and their properties are hereinafter, for convenience, sometimes referred to as the "subsidiaries" and/or "subsidiary companies" and "theatre properties", respectively, and

WHEREAS the Managers are skilled and experienced in the operation of motion picture theatres and Wesco desires to procure the services of the Managers in managing the entire business of Wesco and such of its subsidiaries as it controls except Hoyts Theatre, Ltd. in Australia,

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

(1) Wesco does hereby, for itself and on behalf of the subsidiaries which it controls and on behalf of its other subsidiaries (subject to the approval of such other subsidiaries to this agreement to the extent required) employ Charles Skouras, Spyros Skouras and George Skouras as the Managers of the business of the corporation and its subsidiaries and the Managers accept such employment.

Defendant's Exhibit F

(2) This agreement shall be effective and operative from the beginning of Wesco's present fiscal year, which for the purpose of this agreement shall be regarded as commencing on December 27, 1931. The duration of this agreement shall be for the term of the present fiscal year of Wesco and the succeeding four fiscal years of Wesco, expiring on December 26, 1936, unless sooner terminated as hereinafter provided.

(3) So far as permitted by law, the Managers shall have full authority to direct, manage and operate all of the business and affairs of Wesco (except as hereinafter in this paragraph (3) and paragraph (12) provided), and, in so far as Wesco during the term of this agreement controls the business and affairs of its subsidiary companies, to direct, manage and operate the business and affairs of such subsidiary companies, including, without limiting the generality of the foregoing language, full authority to employ on behalf of Wesco and its subsidiary companies such persons as the Managers may deem necessary for the proper operation of the business and affairs of Wesco and its subsidiary companies, to discharge such employees, to fix their compensation, to enter into all contracts which in their discretion are necessary or expedient in the proper conduct of the business and affairs of Wesco or its subsidiary companies, to have general charge and direction of the operation and management of the properties of Wesco and of its subsidiary companies, and to do or cause to be done, from time to time, all such acts and things as they in their discretion may deem proper in order to conduct the business and affairs of Wesco and of its subsidiary companies, provided, first, that no changes shall be made by the Managers in the accounting and finance departments of Wesco and/or the subsidiaries, as to methods, personnel or otherwise (as

provided in paragraph (12) hereof), and that such changes. if any, in the accounting and treasury departments of Wesco and/or the subsidiaries shall be made only by the Finance Committee of Wesco, and provided, further, that said authority to direct the affairs of the subsidiary companies shall be subject to the provisions of the existing by-laws of Wesco and its subsidiaries, and particularly such provisions of the by-laws as relate to the finance committees provided for in said by-laws and the powers vested in said finance committees by action of the Boards of Directors of the subsidiary companies, and provided, further, that in directing the affairs of the subsidiary companies the Managers shall keep expenditures within the total budget limitations fixed from time to time by the Finance Committees.

(4) As soon as possible after the date of this agreement, but in no event later than February 1, 1932, Wesco will cause a meeting of its Board of Directors to be held, at which time the Board of Directors will elect Spyros Skouras, or one of the other managers designated by him, a director and the President of Wesco. As soon as convenient, but not later than February 1, 1932, Wesco shall cause Spyros Skouras, or one of the other managers designated by him, to be elected as a director and the President of each of the major subsidiaries of Wesco controlled by it. Wesco, during the term of this agreement, will continue Spyros Skouras, or one of the other managers designated by him, in office as a director and President of Wesco, and will continue Spyros Skouras, or one of the other managers designated by him, as a director and President of each of the major subsidiaries of Wesco controlled by it.

(5) The Managers shall devote their entire time and attention to the management of the business of the sub-

sidiary companies, subject only to their existing obligations to Skouras Theatres Corporation as provided in an agreement dated September 30, 1931, between Fox Theatres Corporation and Skouras, and subject to the other demands upon their services as set forth in said agreement (the pertinent provisions of which are annexed hereto and marked Schedule B). The obligations with respect to Skouras Theatres Corporation include the management of the theatres upstate, New York, proposed to be taken over by a company controlled by Skouras Theatres Corporation.

* * *

(7) The Managers shall receive as compensation for their services under this agreement a drawing account and a percentage of the net profits, as hereinafter defined. The Managers shall receive a drawing account of $3,000 per week, commencing when the Managers begin their duties, which shall be chargeable against their share of the net profits. If at the end of any fiscal year the percentage of the net profiits payable to the Managers under this agreement is less than $3,000 per week, an adjustment shall be made and the Managers shall refund to the subsidiary companies a sum equal to the amount by which the drawing account paid them is in excess of their share of the net profits. The Managers shall be paid their share of the net profits in the manner and at the time and in the amounts hereinafter set forth.

The percentages of the net profits payable to the Managers shall be as follows:

10 per cent. of the annual net profits as hereinafter defined up to the first $1,000,000 of such net profits.

12½ per cent. of said annual net profits in excess of $1,000,000, up to $2,000,000.

Defendant's Exhibit F

15 per cent. of said annual net profits in excess of $2,000,000, up to $3,000,000.

17½ per cent. of said annual net profits in excess of $3,000,000, up to $4,000,000.

20 per cent. of said annual net profits in excess of $4,000,000, up to $5,000,000.

25 per cent. of said annual net profits in excess of $5,000,000, up to $6,000,000.

33⅓ per cent. of said annual net profits in excess of $6,000,000.

* * *

(18) Any notice provided or permitted to be given hereunder by one party to the other shall be deemed sufficient in all respects if sent by registered mail or by telegraph within the prescribed time limit to Wesco at 444 West 56th Street, New York City, if it shall be a notice to Wesco, or to Spyros Skouras, Charles Skouras or George Skouras or to any of them at his business address, if it shall be a notice to the Managers.

* * *

(20) The Corporation hereby agrees that during the term of this agreement it will use its influence to the fullest extent necessary and as may be legally permitted as stockholder to the end that all of its partially owned subsidiary companies and each of them shall accept the services of the Managers as managers of such subsidiary companies and shall to the fullest extent cooperate with the Managers in carrying out the intent and purposes of this agreement.

(21) This agreement having been executed in the State of New York, shall be deemed to be a New York contract

Defendant's Exhibit F

with the intention that it be interpreted in accordance with the laws of the State of New York, and that the performance hereunder be governed by the laws of the State of New York, the same as if it were to be fully performed in said State, and that this agreement shall be enforced accordingly.

* * *

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the date hereinabove written.

WESCO CORPORATION

By W. C. MICHEL
Vice President.

CHARLES P. SKOURAS

S. P. SKOURAS

G. P. SKOURAS

Attest:

S. R. BURNS
Secretary.

[CORPORATE SEAL]

The undersigned, Fox Film Corporation, hereby evidences its consent to the foregoing agreement.

FOX FILM CORPORATION,

By E. R. TINKER
President.

Attest:

S. R. BURNS
Secretary.

[CORPORATE SEAL]

Defendant's Exhibit H

AGREEMENT made and entered into this 13th day of June, 1935, between NATIONAL THEATRES CORPORATION, a Delaware corporation (hereinafter referred to as the Corporation), party of the first part, and CHARLES P. SKOURAS of Los Angeles, California, and SPYROS P. SKOURAS of New York, N. Y. (hereinafter sometimes together referred to as the Managers), parties of the second part.

WHEREAS, the Managers have heretofore managed the theatres and/or theatrical enterprises (and certain business and affairs incidental thereto) owned or controlled or operated by the Corporation and/or its past or present subsidiaries in the territory covered by this Agreement; and

WHEREAS, the Corporation desires to be assured of the services of the Managers, to the extent and for the period and upon the terms and conditions hereinafter set forth, with respect to theatres and theatrical enterprises and other business and affairs of the Corporation and/or its subsidiaries, and the Managers are agreeable thereto:

NOW, THEREFORE, in consideration of the premises and of the covenants hereinafter set forth, the parties hereto do hereby mutually agree as follows:

FIRST: (1) The Corporation hereby employs the Managers for the period of time from the date of this Agreement to the close of business on the Saturday nearest December 31, 1944, unless the same be earlier terminated or expire as hereinafter provided.

(2) The Managers, subject to the provisions hereinafter set forth, shall supervise the management of such

theatres and theatrical enterprises owned, controlled or operated by the Corporation in the territory covered by this Agreement, and have such official or executive duties in connection with any other business and affairs of the Corporation in said territory, as the Board of Directors of the Corporation may at any time or from time to time in its discretion determine; and shall supervise the management of such theatres and theatrical enterprises owned, controlled or operated in said territory by subsidiaries of the Corporation which shall accept the services of the Managers under contracts or arrangements satisfactory to the Corporation in its discretion, and have such official or executive duties in connection with any other business and affairs of such subsidiaries in said territory, as the respective Boards of Directors thereof may at any time or from time to time in their discretion determine.

(3) If the Corporation shall at any time or from time to time in its discretion so desire (but not otherwise), the Managers shall also supervise the management of such theatres and theatrical enterprises owned or controlled or operated by the Corporation outside the territory covered by this Agreement, and have such official or executive duties in connection with any other business or affairs of the Corporation outside said territory, as the Board of Directors of the Corporation may at any time or from time to time in its discretion determine; and shall supervise the management of such theatres and theatrical enterprises owned or controlled or operated outside said territory by subsidiaries of the Corporation which shall accept the services of the Managers under contracts or arrangements satisfactory to the Corporation in its discretion, and have such official or executive duties in connection with any other business and affairs of such subsidiaries outside said territory, as the

Defendant's Exhibit H

respective Boards of Directors thereof may at any time or from time to time in their discretion determine.

* * *

(5) The Managers, in performing services or duties hereunder with respect to any theatres or theatrical enterprises or any other business or affairs of the Corporation or any subsidiary thereof, as hereinabove provided, shall act only in such official or executive capacities, if any, and only with such powers, as the Board of Directors of the Corporation or such subsidiary, as the case may be, may at any time or from time to time in its discretion determine, and, in performing such services or duties or serving in such capacities, shall be subject at all times and in all respects to the direction and control of the Board of Directors of the Corporation and such subsidiary, as the case may be, to all provisions of the respective by-laws of the Corporation and such subsidiary and to all resolutions and regulations adopted by the Board of Directors of the Corporation and such subsidiary, respectively. One or both of the Managers may (but need not) at any time or from time to time be elected a director and/or officer of the Corporation or any subsidiary thereof, and, if elected, the Manager or Managers so elected agree to act as such, subject to the provisions of the charter, by-laws or other regulations or resolutions of the Corporation or such subsidiary.

* * *

SECOND: The obligations and duties of the Managers hereunder shall be personal and not assignable or delegable by them in any manner whatsoever. The Corporation may, however, at any time or from time to time in its discretion assign all or any of its rights hereunder to all or any part of the services of the Managers either to any subsidiary or subsidiaries rendering management services directly or

Defendant's Exhibit H

indirectly to theatres or theatrical enterprises or other properties (which may or may not be theatres, enterprises or properties owned, controlled or operated by the Corporation or any of its subsidiaries) or to any subsidiary or subsidiaries of the Corporation owning, controlling or operating theatres or theatrical enterprises or other properties; any rights so assigned may be reassigned at any time to the Corporation or any subsidiary thereof. Notwithstanding any such assignment, the Corporation shall remain unconditionally liable as principal obligor for all obligations to be performed by it hereunder to the extent the same are not fully and finally performed by any such assignee, and the Corporation and the Managers shall retain all their rights hereunder, including without limitation any right to terminate this Agreement or enforce any of the provisions thereof for their own benefit, to the same extent as though no such assignment had taken place. The Managers, in addition to their continuing obligation to the Corporation, shall become directly obligated to each such assignee, insofar as the Corporation's rights are assigned to it, for the performance of their duties and obligations hereunder; but, notwithstanding any such assignment or any assumption connected therewith, neither of the Managers shall have any right or claim against any subsidiary for or on account of or in respect of all or any part of any salary, additional compensation or other sum payable to the Managers hereunder except and then only to the extent at any time expressly consented to in writing by the Corporation, and no subsidiary of the Corporation shall be obligated for said salary or additional compensation or other sum or any part thereof or for the performance of any of the covenants or provisions of this Agreement except and then only to the extent expressly agreed upon in writing at any time by the Corporation and such subsidiary. This provision, however,

Defendant's Exhibit H

shall not prevent the Corporation or any such assignee, if it in its discretion so determines, from receiving from any subsidiary or subsidiaries, under such arrangements as may be made with it or them, all or any part of said salary, additional compensation or other sum payable to the Managers hereunder.

THIRD: (1) The Managers hereby accept employment hereunder upon all the terms and conditions of this Agreement and during the term thereof agree to devote their time, except as specifically provided in subparagraph (b) of Paragraph (2) below and not otherwise, exclusively to such employment and to perform the services herein contemplated to be performed by them faithfully, diligently and to the best of their respective abilities. * * *

* * *

(4) Charles P. Skouras as one of the Managers may reside in or in the vicinity of the City of Los Angeles, California, and in performing services for the Corporation or any subsidiary thereof, as hereinabove provided, may have his principal office at such place in said city as the Board of Directors of the Corporation or such subsidiary, as the case may be, may select. Spyros P. Skouras as the other Manager may reside in or in the vicinity of the City of New York, N. Y., or the Cities of Newark or Jersey City, N. J., and in performing services for the Corporation or any subsidiary thereof, as hereinabove provided, may have his office at such place in any one or more of said cities designated by the Board of Directors of the Corporation or such subsidiary, as the case may be, as such Board may select. If either of the Managers shall die or become incapacitated or this Agreement be terminated as to said Spyros P. Skouras, then the surviving or continuing Man-

ager shall then have his office at such place in New York City, Los Angeles, Newark or Jersey City, as the Board of Directors of the Corporation or such subsidiary may select, and shall then reside in or in the vicinity of the city so selected.

FOURTH: (1) Upon and in consideration of the execution and delivery of this Agreement by the Managers, the Corporation has paid to the Managers jointly the sum of $65,582.10, receipt whereof is hereby acknowledged by the Managers.

(2) From and after the date of this Agreement, for all services of every kind rendered by the Managers hereunder during the term of this Agreement, the Corporation, at the times hereinafter specified, will pay or cause to be paid to the Managers jointly as salary the amount described in subdivision (a) below and as additional compensation the amount described in subdivision (b) below, that is to say:

(a) as salary hereunder, commencing with the date of this Agreement, the fixed sum of Three Thousand Dollars ($3,000) per week, payable at the end of each week or on any day of the succeeding week during the term of this Agreement;

(b) as additional compensation hereunder, a sum for each fiscal year during the term of this Agreement equal to the following percentages or fractions of the Contract Annual Profits (hereinafter defined) in such year, to-wit:

1/9th of the first Five Hundred Sixty-Two Thousand Five Hundred Dollars ($562,500) or any part thereof of such Contract Annual Profits;

Defendant's Exhibit H

3/23rds of the next Five Hundred Seventy-Five Thousand Dollars ($575,000) or any part thereof of such Contract Annual Profits;

7/47ths of the next Five Hundred Eighty-Seven Thousand Five Hundred Dollars ($587,500) or any part thereof of such Contract Annual Profits;

1/6th of the next One Million Two Hundred Thousand Dollars ($1,200,000) or any part thereof of such Contract Annual Profits;

3/23rds of the next One Million One Hundred Fifty Thousand Dollars ($1,150,000) or any part thereof of such Contract Annual Profits; and finally

1/11th of the next One Million One Hundred Thousand Dollars ($1,100,000) or any part thereof of such Contract Annual Profits;

provided that if the Corporation's fiscal year shall be changed at any time and as a result Contract Annual Profits or Contract Annual Losses are calculated for an accounting term less than a full fiscal year of fifty-two or fifty-three weeks (other than the accounting term provided for in the last paragraph of Article NINTH hereof), the above portions of Contract Annual Profits shall be reduced, for the purpose of calculating additional compensation for such shorter accounting term and not otherwise, to the respective amounts which bear the same relations to the amounts set forth above, respectively, as the number of days in such accounting term bears to 365.

* * *

Defendant's Exhibit H

SIXTEENTH: This Agreement, which shall not be deemed to constitute either of the Managers partners with the Corporation or with each other, is to be construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have signed and sealed this Agreement the day and year first above written.

NATIONAL THEATRES CORPORATION

By H. C. Cox
Vice-President

(CORPORATE SEAL)

ATTEST:

A. S. GAMBEE
Ass't. Secretary

CHARLES P. SKOURAS (L. S.)

SPYROS P. SKOURAS (L. S.)

WITNESS:

ARTHUR A. GOLDBERG

Defendant's Exhibit I.

PROMISSORY NOTE

$65,000 June 25, 1932.

On Demand after date FOR VALUE RECEIVED the undersigned hereby promises to pay to Fox West Coast Service Corporation or order, at the main office of THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Pine Street corner of Nassau, Borough of Manhattan, in the City of New York, N. Y.,

SIXTY-FIVE THOUSAND AND 00/100 DOLLARS ($65,000), with interest at the rate of 6% per annum payable monthly.

It is further agreed that if the undersigned or any endorser and/or guarantor hereof shall become insolvent (however such insolvency may be evidenced) or make a general assignment for the benefit of creditors, or if the undersigned shall suspend the transaction of its usual business, or if a petition in bankruptcy shall be filed by or against, or if a receiver shall be appointed of, or a writ or order of attachment or garnishment shall be issued or made against any of the property or assets, or any part thereof, of the undersigned, or of any such endorser or guarantor, thereupon, unless the holder hereof shall otherwise elect, this note and all other present or future demands of any and all kind against the undersigned, whether absolute or contingent, shall become and be due and payable forthwith, without presentation, demand, protest, notice of protest or other notice of dishonor of any kind, all of which are hereby expressly waived.

PASADENA THEATRE CORPORATION

by CHARLES P. SKOURAS
President.

J. N. SCHMITZ
Asst. Treasurer.

Address: 1609 West Washington Street,
Los Angeles, California.

Defendant's Exhibit I

ENDORSEMENTS AND GUARANTIES OF PAYMENT

IN CONSIDERATION of One Dollar ($1.00), receipt whereof is hereby acknowledged, and of the credit given or discount, loan or extension of time made by or upon the within note, which the undersigned requested, the undersigned (if more than one jointly and severally), hereby unconditionally guarantee to THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, New York, its successors and assigns, and every subsequent holder of said note, irrespective of the genuineness, validity, regularity or enforceability thereof, or of the obligation evidenced thereby, or of the obligation evidenced thereby, or of any collateral at any time given therefor, or of the existence or extent of any such collateral, and irrespective of any other circumstance, that all sums stated therein to be payable thereunder shall be promptly paid in full when due, in accordance with the provisions thereof, at maturity, by acceleration or otherwise, and, in case of extension of time of payment in whole or in part, all said sums shall be promptly paid when due according to such extension or extensions at maturity, by acceleration or otherwise; and the undersigned hereby consent that from time to time, without notice to the undersigned, payment of any sums payable under said note, or of any collateral therefor, may be extended in whole or in part or any of said collateral be exchanged, surrendered or otherwise dealt with as the holder of the within note may determine. The signature or signatures of the undersigned hereto is or are intended as an endorsement of the within note as well as the execution of the foregoing guaranty of payment thereof by each of the undersigned, who hereby

respectively waive presentment, demand of payment from the maker, protest and notice of non-payment or protest.

FOX WEST COAST SERVICE CORPORATION,

by H. G. FAHLBUSCH
President.

CHARLES A. BUCKLEY
Treasurer.

Address:

1609 West Washington Boulevard, Los Angeles, Calif.

WESCO CORPORATION,

by S. P. SKOURAS
President.

CHAS. E. RICHARDSON
Treasurer.

Address:

444 West 56th Street
New York, N. Y.

FOX WEST COAST THEATRES,

by S. P. SKOURAS
President.

CHARLES A. BUCKLEY
Treasurer.

Address:

1609 West Washington Boulevard, Los Angeles, Calif.

Defendant's Exhibit J

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

HILLSIDE AMUSEMENT COMPANY, Plaintiff, —*against*— WARNER BROS. PICTURES, INC., et al., Defendants.	Civil Action No. 13-77

Sir:

PLEASE TAKE NOTICE that the defendant National Theatres Corporation hereby appears in the above entitled action, and that we have been retained as attorneys for said defendant therein, and demand that a copy of the complaint and all papers in this action be served upon us at our office, No. 100 Broadway, Borough of Manhattan, City, County and State of New York.

Dated: New York, N. Y., October 7th 1941.

Yours, etc.,

DWIGHT, HARRIS, KOEGEL & CASKEY
Dwight, Harris, Koegel & Caskey,
Attorneys for Defendant National Theatres Corporation,
Office and P. O. Address
100 Broadway
Borough of Manhattan,
New York, N. Y.

To:

NORMAN H. SAMUELSON, ESQ.,
Attorney for Plaintiff,
Office and P. O. Address
39 Broadway,
New York, N. Y.

Defendant's Exhibit K

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HILLSIDE AMUSEMENT CO., Plaintiff, —*against*— WARNER BROS. PICTURES, INC., et al., Defendants.	Civil Action No. 13-77 ORDER

The defendant National Theatres Corporation having moved this Court for an order setting aside and quashing service upon such defendant, and this Court having heard William W. Owens, Esq., of counsel for the defendant National Theatres Corporation, in support of said motion and Norman H. Samuelson, Esq., attorney for defendant, in opposition thereto; and this Court having rendered an opinion thereon dated July 11, 1941 providing for a reference; and no further action having been taken thereon by either plaintiff or defendant National Theatres Corporation; and defendant National Theatres Corporation having on October 8, 1941 entered its general appearance herein; and the attorneys for defendant National Theatres Corporation having suggested to the Court that said motion has now become moot by reason of such general appearance; and the attorney for plaintiff having consented to the making and entry of this order, it is

ORDERED, ADJUDGED and DECREED that the motion of defendant National Theatres Corporation to set aside and

Defendant's Exhibit K

quash the service of the summons upon it be and the same is hereby dismissed without costs to either party.

Dated: New York, October 1941.

.....
U. S. D. J.

The making and entry of the above order is hereby consented to, and notice with respect thereto is waived.

NORMAN H. SAMUELSON
Attorney for Plaintiff

Defendant's Exhibit L

IN THE

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

H. L. GUMBINER,

Plaintiff,

vs.

FOX WEST COAST THEATRES, a corporation, Bankrupt, CHARLES P. SKOURAS, WILLIAM H. MOORE, JR. and CHARLES C. IRWIN, as Trustees in Bankruptcy of the Estate of Fox West Coast Theatres, a corporation, Bankrupt; FOX WEST COAST THEATRES CORPORATION, a corporation, PRINCIPAL THEATRES, INC., a corporation, DOWN TOWN THEATRES, INC., a corporation, COMBINED THEATRES CORP., a corporation, FOX COSMOPOLITAN THEATRE CO., LTD., a corporation, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, a corporation, FOX FILM CORPORATION, a corporation, PARAMOUNT PICTURES DISTRIBUTING CO., INC., a corporation, VITAGRAPH, INC., a corporation, R-K-O DISTRIBUTING CORPORATION, INC., a corporation, UNITED ARTISTS CORPORATION, a corporation, COLUMBIA PICTURES CORPORATION, a corporation, UNIVERSAL FILM EXCHANGE, INC., a corporation, FIRST NATIONAL PICTURES, INC., a corporation, CHARLES P. SKOURAS, JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE ONE COMPANY, a corporation, JOHN DOE TWO COMPANY, a corporation, JOHN DOE THREE COMPANY, a corporation, JOHN DOE FOUR COMPANY, a corporation, JOHN DOE FIVE COMPANY, a corporation,

Defendants.

IN EQUITY

No. 520-M

BILL OF COMPLAINT FOR INJUNCTION AND DAMAGES UNDER SHERMAN ANTI-TRUST ACT AND CLAYTON ACT.

Plaintiff brings this bill of complaint and action for an injunction and damages against the defendants, and each of them, under and pursuant to the provisions of the

Defendant's Exhibit L

Act of Congress of July 2, 1890, entitled "An Act to protect Trade and Commerce against Unlawful Restraints and Monopolies" (26 Stats. 209), commonly known as the Sherman Anti-Trust Act), and the provisions of the Act of Congress of October 15, 1914, as amended May 15, 1918 and May 26, 1920, entitled "An Act to supplement Existing Laws against Unlawful Restraints and Monopolies and for other Purposes (38 Stats. 730, commonly known as the Clayton Act), both of said Acts being further known as Chapter 1, of Title 15, of the Code of Laws of the United States of America, and for cause of action against the defendants, and each of them, alleges:

I

That plaintiff is a citizen and a resident of the State of California.

II

That plaintiff is informed and believes, and therefore alleges, that the following named defendants, and each of them, are corporations duly organized and existing under and by virtue of the laws of the respective states set opposite their respective names:

Fox West Coast Theatres	Delaware
Fox West Coast Theatres Corporation	Delaware
Principal Theatres, Inc.	California
Down Town Theatres, Inc.	California
Combined Theatres Corp.	California
Fox Cosmopolitan Theatre Co., Ltd.	California
Metro-Goldwyn-Mayer Distributing Corporation	New York
Fox Film Corporation	New York
Paramount Pictures Distributing Co., Inc.	New Jersey

Defendant's Exhibit L

Vitagraph, Inc.	New York
R-K-O Distributing Corporation	Delaware
United Artists Corporation	Delaware
Columbia Pictures Corporation	New York
Universal Film Exchange, Inc.	Delaware
First National Pictures, Inc.	Delaware

III

That on or about the 28th day of February, 1933, upon a voluntary petition duly filed in the above entitled court, said Fox West Coast Theatres, a corporation, was adjudicated bankrupt and Charles P. Skouras, William H. Moore, Jr. and Charles C. Irwin were regularly elected to be, and qualified as, the Trustees of the bankrupt estate of said Fox West Coast Theatres, a corporation, Bankrupt, and said Charles P. Skouras, William H. Moore, Jr. and Charles C. Irwin have been at all times thereafter, and now are, the duly elected, appointed, qualified and acting Trustees in Bankruptcy of the Estate of Fox West Coast Theatres, a corporation, Bankrupt.

IV

That the defendants Charles P. Skouras, William H. Moore, Jr. and Charles C. Irwin, as Trustees in Bankruptcy of the Estate of Fox West Coast Theatres, a corporation, Bankrupt, the defendant Fox West Coast Theatres Corporation, the defendant Principal Theatres, Inc., the defendant Down Town Theatres, Inc. the defendant Combined Theatres Corp. and the defendant Fox Cosmopolitan Theatre Co., Ltd. have, and that each of them has, its/their office and place of business at 1837 South Vermont Avenue, Los Angeles, in this state and district.

* * *

Defendant's Exhibit L

That the defendant Fox Film Corporation has its office and place of business at 2019 South Vermont Avenue, Los Angeles, in this state and district.

* * *

That the defendant Charles P. Skouras has an office and place of business at 1837 South Vermont Avenue, Los Angeles, in this state and district.

V

That the true names of the defendants John Doe One, John Doe Two, John Doe Three, John Doe One Company, a corporation, John Doe Two Company, a corporation, John Doe Three Company, a corporation, John Doe Four Company, a corporation, and John Doe Five Company, a corporation, are at this time unknown to plaintiff, and plaintiff will ask leave of this court to amend his complaint and insert said true names when said true names are by plaintiff ascertained.

VI

DESCRIPTION OF INDUSTRY

* * *

VII

INTERSTATE COMMERCE IN MOTION PICTURES.

* * *

VIII

CONTINUITY OF INTERSTATE COMMERCE

* * *

Defendant's Exhibit L

IX

DEFENDANTS ARE ENGAGED IN INTERSTATE COMMERCE.

During all of the time herein mentioned the defendants were, and they are now, engaged in interstate commerce, in that—

1. The defendants, Metro-Goldwyn-Mayer Distributing Corporation, Fox Film Corporation, Paramount Pictures Distributing Co., Inc., Vitagraph, Inc., R-K-O Distributing Corporation, United Artists Corporation, Columbia Pictures Corporation, Universal Film Exchange and First National Pictures, Inc., at all times herein mentioned have been, and now are, engaged in the business of distributing motion picture films, and said defendants, and each of them, did, and do, conduct and maintain their said business in the manner hereinabove alleged.

2. The defendants Fox West Coast Theatres, a Bankrupt, Charles P. Skouras, William H. Moore, Jr. and Charles C. Irwin, as Trustees in Bankruptcy of the Estate of Fox West Coast Theatres, a corporation, Fox West Coast Theatres Corporation, Principal Theatres, Inc., Down Town Theatres, Inc., Combined Theatres Corp. and Fox Cosmopolitan Theatre Co., Ltd. are hereinafter sometimes referred to as "defendant exhibitors", and they are, and each of them is, engaged in the business of conducting and operating motion picture theatres, exhibiting motion picture film contracted for, produced, distributed and exhibited as herein alleged, as follows:

(a) At all times herein alleged prior to the date of the bankruptcy of Fox West Coast Theatres, said corporation controlled, directly or indirectly, over four hundred theatres

located throughout the western part of the United States, ranging from the state of Illinois to the Pacific Coast and from Mexico to Canada. Said control was effected by an elaborate system of subsidiary corporations in which said defendant owned all or a part of the stock. Such subsidiary corporations were, and are, more than one hundred and fifty in number, and such subsidiaries owned and operated theatres and, in turn, owned the whole or a part of the stock of other subsidiaries which also, in turn, owned and operated theatres, and likewise owned the whole or a part of stock in still other subsidiaries owning and operating theatres, to the extent that in some instances as many as five subsidiary corporations and the stock thereof intervened between the parent corporation, Fox West Coast Theatres, and the corporation owning and operating the theatre.

(b) The defendant Fox West Coast Theatres, from and after February 25, 1933, and until its adjudication in bankruptcy on February 28, 1933, owned all of the stock of Fox West Coast Theatres Corporation, and at all times after said adjudication in bankruptcy, and now, the defendant trustees own and hold all of the stock of the defendant Fox West Coast Theatres Corporation. At all times herein alleged prior to February 25, 1933, the defendant Fox West Coast Theatres owned and held, and at all times after February 25, 1933, the defendant Fox West Coast Theatres Corporation owned and held, and now owns and holds, the whole or a part of the stock of twenty-nine, or more, subsidiaries engaged in operating motion picture theatres, as above alleged, and, particularly, as above alleged, the said defendants, Fox West Coast Theatres and Fox West Coast Theatres Corporation, owned and held, and the defendant Fox West Coast Theatres Corporation now owns and holds, in excess of fifty per cent of the

stock of the defendant Principal Theatres, Inc., the defendant Down Town Theatres, Inc., the defendant Combined Theatres Corp. and the defendant Fox Cosmopolitan Theatre Co., Ltd. The said defendants Fox West Coast Theatres and Fox West Coast Theatres Corporation, at the times above alleged respectively owned and held, and Fox West Coast Theatres Corporation now owns and holds all of the stock of Fox West Coast Service Corporation. At all times herein mentioned said Fox West Coast Service Corporation acted as a fiscal agent for all of the subsidiary corporations, collected all of the moneys from the operation of the theatres, paid all the bills for the operation of the theatres, bore the general expense, kept separate sets of books for each subsidiary corporation, employed and paid all the officials and employees of the various offices, made all necessary purchases, furnished all necessary service, and arranged for the purchase, distribution and booking of films in all of the theatres and also in numerous other motion picture theatres not otherwise owned or operated by or connected with the defendants.

(c) The defendants Principal Theatres, Inc., Down Town Theatres, Inc., Combined Theatres Corp. and Fox Cosmopolitan Theatre Co., Ltd., own and/or operate six, or more, downtown motion picture theatres in the City of Los Angeles, including the President Theatre, the Rialto Theatre, the Roxie Theatre, the Orpheum Theatre, the Palace Theatre and Loew's State Theatre. That Loew's State Theatre is a first-run theatre; that the President Theatre, the Rialto Theatre and the Orpheum Theatre are second-run theatres; and that the Roxie Theatre and the Palace Theatre are third and/or fourth-run theatres, and that all of said theatres are downtown theatres located on Broadway in the City of Los Angeles in close proximity to,

and operated in competition with the theatres owned and/or operated by the plaintiff, as hereinafter alleged.

3. Defendant Charles P. Skouras is the president of Fox West Coast Theatres Corporation and the general manager of all of the businesses alleged in subdivisions (a), (b) and (c) of this paragraph.

X

Plaintiff Is Engaged in Interstate Commerce.

At all times herein mentioned subsequent to January 30, 1931, and prior to December *8th,* 1931, plaintiff operated the Los Angeles Theatre in the City of Los Angeles, California. Said Los Angeles Theatre was, and is, located on the west side of Broadway, between Sixth and Seventh Streets, in said City of Los Angeles, California, being a central and desirable location in said city, and in all other respects said Los Angeles Theatre was, and is, designed, constructed and equipped as a first-run downtown theatre. At all times in this paragraph mentioned plaintiff exhibited therein motion picture films contracted for, produced, distributed and exhibited in interstate commerce.

At all times herein mentioned plaintiff also operated the Tower and Cameo theatres in the City of Los Angeles, California. Said Tower Theatre is located at the southeast corner of Eighth and Broadway, in said City of Los Angeles, California, it being a central and desirable location in said city, and in all other respects said Tower Theatre is designed, constructed and equipped as a first or second-run downtown theatre. Said Cameo Theatre is located on the east side of Broadway, between Fifth and Sixth Streets,

in said City of Los Angeles, California, it being a central and desirable location in said city, and in all other respects said Cameo Theatre is designed, constructed and equipped as a second or third-run downtown theatre. At all times herein mentioned plaintiff exhibited in said Tower Theatre and said Cameo Theatre motion picture films contracted for, produced, distributed and exhibited in interstate commerce.

XI

THE CONSPIRACY.

The defendants, and each of them, well knowing all of the matters and things hereinbefore alleged, unlawfully conspired and engaged in a conspiracy in a restraint of said interstate trade and commerce in motion picture films so carried on by said defendant distributors and by said defendant exhibitors, and the plaintiff exhibitor, as aforesaid; that is to say, a conspiracy here now described in restraint of, and which throughout the period, or periods, of time herein mentioned, in fact, unlawfully did restrain said interstate trade and commerce, to-wit:

* * *

(i) To exclude plaintiff, in the course of the aforesaid interstate trade and commerce, from operating said Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre.

(j) To exclude plaintiff, in the course of the aforesaid interstate trade and commerce, from operating said Los Angeles and/or Tower and/or Cameo theatres, in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres.

Defendant's Exhibit L

(k) To exclude plaintiff, in the course of the aforesaid interstate trade and commerce, from operating said Los Angeles Theatre, in the City of Los Angeles, California, as a first-run motion picture theatre in competition with the theatres operated by the defendant exhibitors.

(l) To exclude plaintiff, in the course of the aforesaid interstate trade and commerce, from operating said Los Angeles and/or Tower and/or Cameo theatres, in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres in competition with the theatres operated by the defendant exhibitors.

(m) To coerce and compel plaintiff, in the course of the aforesaid interstate trade and commerce, to cease to operate the Los Angeles Theatre, in the City of Los Angeles, California, as a first-run motion picture theatre.

(n) To coerce and compel plaintiff, in the course of the aforesaid interstate trade and commerce, to cease to operate the Los Angeles and/or Tower and/or Cameo theatres, in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres.

(o) To coerce and compel plaintiff, in the course of the aforesaid interstate trade and commerce, to cease to operate the Los Angeles Theatre, in the City of Los Angeles, California, as a first-run motion picture theatre in competition with the theatres operated by the defendant exhibitors.

(p) To coerce and compel plaintiff, in the course of the aforesaid interstate trade and commerce, to cease to operate the Los Angeles and/or Tower and/or Cameo theatres, in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres in competition with the theatres operated by the defendant exhibitors.

Defendant's Exhibit L

All with the intent and for the purpose of coercing, compelling and excluding plaintiff, as hereinabove alleged, and all in the manner and by the means and through the acts hereinafter set forth.

XII

Means and Acts

Defendants, and each of them, have carried out the aforesaid unlawful purposes and objects in the following manner and by the following means, to-wit:

A

That during the period commencing January 30, 1931, and ending approximately September 1, 1931, which latter date was, to the best of plaintiff's information and belief, the end of the 1930-1931 motion picture year, or, as the same is known in the motion picture industry, the 1930-1931 season, plaintiff required for the operation of the Los Angeles Theatre, in the City of Los Angeles, California, the right to exhibit, as first-run motion pictures in said theatre, not less than thirty-two (32) first-run feature motion pictures. * * *

* * *

Plaintiff alleges that he does not know the exact date of the illegal agreement, combination and conspiracy now about to be alleged, but, on information and belief, plaintiff alleges that on or about the 1st day of February, 1931, the defendants . . . undertook, promised, covenanted and agreed, each with the other, that thereafter none of said feature motion pictures distributed by said defendant distributors

should be furnished, delivered or made available for use to plaintiff in said Los Angeles Theatre for exhibition as first, second or third-run motion pictures. * * *

That certain of said defendant exhibitors at that time operating theatres competing with plaintiff's, contracted for and purchased first, second and third-run feature motion pictures of defendant distributors in excess of their needs and requirements in the theatres operated by them, and thereafter frequently paid for pictures not exhibited by them and/or acquired additional theatres in which to exhibit said surplus pictures and/or supplied said surplus pictures to other theatres in return for an interest in the profits of such other theatres; all with the intent and for the purpose of preventing plaintiff from obtaining the motion pictures required by him to operate said Los Angeles Theatre and with the intent and for the purpose to force him out of business, which purpose said defendants accomplished on December 8, 1931.

B

That during the period of one year commencing with the late summer or early fall of the year 1932 and ending with the late summer or early fall of the year 1933, which period of time is hereinafter referred to as the season of 1932-1933, plaintiff required for the operation of the Tower Theatre and the Cameo Theatre in the City of Los Angeles, California, the right to exhibit, as second-run motion pictures in said Tower Theatre and as third-run motion pictures in said Cameo Theatre, not less than fifty-two (52) second-run feature motion pictures and not less then fifty-two (52) third-run feature motion pictures. . . .

* * *

Defendant's Exhibit L

XIII

The Result.

As a direct and proximate result of all of the acts and things had and done by the defendants, as hereinabove alleged, all of the purposes alleged in the preceding paragraph numbered XI have been, and are, accomplished and, in particular, as a direct and proximate result of the acts and things had and done by the defendants, as hereinabove alleged, the plaintiff was, and has been:

* * *

(i) Precluded, excluded and prevented from operating said Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre.

(j) Precluded, excluded and prevented from operating said Los Angeles and/or Tower and/or Cameo in the City of Los Angeles, California, as second and/or third and/or subsequent-run motion picture theatres.

(k) Precluded, excluded and prevented from operating said Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre in competition with the theatres operated by the defendant exhibitors.

(l) Precluded, excluded and prevented from operating said Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres in competition with the theatres operated by the defendant exhibitors.

(m) Coerced and compelled to cease to operate the Los Angeles Theatre in the City of Los Angeles as a first-run motion picture theatre.

Defendant's Exhibit L

(n) Coerced and compelled to cease to operate the Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent-run motion picture theatres.

(o) Coerced and compelled to cease to operate the Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre in competition with the theatres operated by the defendant exhibitors.

(p) Coerced and compelled to cease to operate the Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent-run picture theatres in competition with the theatres operated by the defendant exhibitors.

XIV

Damage

As a direct and proximate result of the acts and things had and done by the defendants, as hereinabove alleged, and as a direct and proximate result of having been precluded, excluded and prevented, and coerced and compelled, as hereinabove alleged, plaintiff has been damaged and injured in the sum of One Million Five Hundred Twenty Thousand ($1,520,000.00) Dollars.

Pursuant to the act commonly known as the Sherman Anti-Trust Act, said damages in the sum of One Million Five Hundred Twenty Thousand ($1,520,000.00) Dollars should be trebled.

* * *

Defendant's Exhibit L

XVI

The defendants, and each of them, threaten to, and will, unless enjoined and restrained by the order of this Court from continuing their aforesaid unlawful and burdensome acts, continue in the performance thereof. That notwithstanding that plaintiff has on divers and numerous occasions sought to obtain from the defendants, and each of them, his fair and just proportion of said defendants' motion pictures, they have refused to permit plaintiff to exhibit the same.

* * *

AND AS AND FOR A FURTHER, SEPARATE AND SECOND CAUSE OF ACTION, PLAINTIFF REPEATS AND REALLEGES ALL, EACH AND EVERY PARAGRAPH OF THE FIRST CAUSE OF ACTION, SAVE AND EXCEPT PARAGRAPH XI, AND MAKES THE SAME A PART HEREOF BY REFERENCE AS FULLY AND COMPLETELY AS THOUGH SET FORTH HEREIN AT LENGTH.

I

COMBINATION IN RESTRAINT OF TRADE.

The defendants, and each of them, well knowing all of the matters and things hereinbefore alleged, unlawfully engaged in a combination in restraint of said interstate trade and commerce in motion picture films so carried on, as aforesaid, by said defendant distributors, by said defendant exhibitors, and by said plaintiff exhibitor; that is to say, in a combination here now described in restraint of and which throughout the period of time herein mentioned, in fact, unlawfully did restrain said interstate trade and commerce, to-wit: a combination:

* * *

Defendant's Exhibit L

(i) To preclude, exclude and prevent plaintiff from operating said Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre.

(j) To preclude, exclude and prevent plaintiff from operating said Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres.

(k) To preclude, exclude and prevent plaintiff from operating said Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre in competition with the theatres operated by the defendant exhibitors.

(l) To preclude, exclude and prevent plaintiff from operating said Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres in competition with the theatres operated by the defendant exhibitors.

(m) To coerce and compel plaintiff to cease to operate the Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre.

(n) To coerce and compel plaintiff, to cease to operate the Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres.

(o) To coerce and compel plaintiff to cease to operate the Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre in competition with the theatres operated by the defendant exhibitors.

(p) To coerce and compel plaintiff to cease to operate the Los Angeles and/or Tower and/or Cameo Theatres in

the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres in competition with the theatres operated by the defendant exhibitors.

All with the intent and for the purpose of precluding, excluding, preventing, coercing and compelling plaintiff as herein alleged, and all in the manner and by the means and through the acts herein set forth.

AND AS AND FOR A FURTHER, SEPARATE AND THIRD CAUSE OF ACTION, PLAINTIFF REPEATS AND REALLEGES ALL, EACH AND EVERY PARAGRAPH OF THE FIRST CAUSE OF ACTION, SAVE AND EXCEPT PARAGRAPH XI, AND MAKES THE SAME A PART HEREOF BY REFERENCE AS FULLY AND COMPLETELY AS THOUGH SET FORTH HEREIN AT LENGTH.

I

MONOPOLY

That the defendants, and each of them, well knowing all of the matters and things hereinbefore alleged, unlawfully engaged in a combination to monopolize and to attempt to monopolize said interstate trade and commerce in motion picture films so carried one, as aforesaid, by said defendant distributors, by said defendant exhibitors, and plaintiff exhibitor, and that said combination did, and does, monopolize said interstate trade and commerce in motion picture films in the City of Los Angeles, California, and which combination will continue to monopolize the interstate trade and commerce in motion picture films in the City of Los Angeles, California, which combination had, and has, the following effects and results:

* * *

Defendant's Exhibit L

(i) Of precluding, excluding and preventing plaintiff from operating said Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre.

(j) Of precluding, excluding and preventing plaintiff from operating said Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres.

(k) Of precluding, excluding and preventing plaintiff from operating said Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre in competition with the theatres operated by the defendant exhibitors.

(l) Of precluding, excluding and preventing plaintiff from operating said Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres in competition with the theatres operated by the defendant exhibitors.

(m) Of coercing and compelling plaintiff to cease to operate the Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre.

(n) Of coercing and compelling plaintiff to cease to operate the Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres.

(o) Of coercing and compelling plaintiff to cease to operate the Los Angeles Theatre in the City of Los Angeles, California, as a first-run motion picture theatre in com-

petition with the theatres operated by the defendant exhibitors.

(p) Of coercing and compelling plaintiff to cease to operate the Los Angeles and/or Tower and/or Cameo Theatres in the City of Los Angeles, California, as second and/or third and/or subsequent run motion picture theatres in competition with the theatres operated by the defendant exhibitors.

All with the intent and for the purpose of precluding, excluding, preventing, coercing and compelling plaintiff as herein alleged, and all in the manner and by the means and through the acts herein set forth.

WHEREFORE, plaintiff prays:

1. That writs of subpoena issue out of this Honorable Court directed to the defendants, ...

2. That the defendants, and each of them, and each and all of the respective officers and directors, and each and all of the respective agents, servants and employees of the defendants, and each of them, and all persons, acting or claiming to act on behalf of the defendants, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, the monopoly and restraint of interstate trade and commerce in motion pictures described herein, and from entering into and/or carrying out, directly or indirectly, any monopoly or restraint of interstate trade and commerce in motion pictures similar to that alleged herein.

3. That the defendants, and each of them, and each and all of the respective officers and directors, and each and

all of the respective agents, servants and employees of the defendants, and each of them, and all persons, acting or claiming to act on behalf of the defendants, or any of them, be enjoined from performing, or continuing to perform, any and all of the illegal acts in this bill of complaint set forth as a means of effectuating the said monopoly and restraint of interstate trade and commerce in motion pictures.

4. That a mandatory injunction issue herein commanding and enjoining the defendants, and each of them, to lease, deliver and/or furnish unto plaintiff a fair and just proportion of said motion pictures at the fair and reasonable value thereof for plaintiff's theatres in the City of Los Angeles, California.

* * *

7. That the plaintiff have and recover damages against the defendants Down Town Theatres, Inc., a corporation, and Charles P. Skouras, and each of them, in the sum of Six Hundred Twenty Thousand ($620,000.00) Dollars; that said damages be trebled; for attorney's fees in the sum of One Hundred Thousand ($100,000.00) Dollars; for costs of this suit and for such other and further relief as may be proper in the premises.

8. That the plaintiff have and recover damages against the defendants Charles P. Skouras, William H. Moore, Jr., and Charles C. Irwin, as trustees in bankruptcy of the estate of Fox West Coast Theatres, Inc., a corporation, and each of them, in the sum of Five Hundred Ninety Thousand ($590,000.00) Dollars; that said damages be trebled; for attorney's fees in the sum of One Hundred Thousand ($100,000.00) Dollars; for costs of this suit and for such other and further relief as may be proper in the premises.

Defendant's Exhibit L

9. That plaintiff have such other and further or different relief as to the Court may seem just, proper and equitable.

/s/ JULES C. GOLDSTONE

/s/ JOHN H. TRACY
Attorneys for Plaintiff.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION } ss

H. L. GUMBINER, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

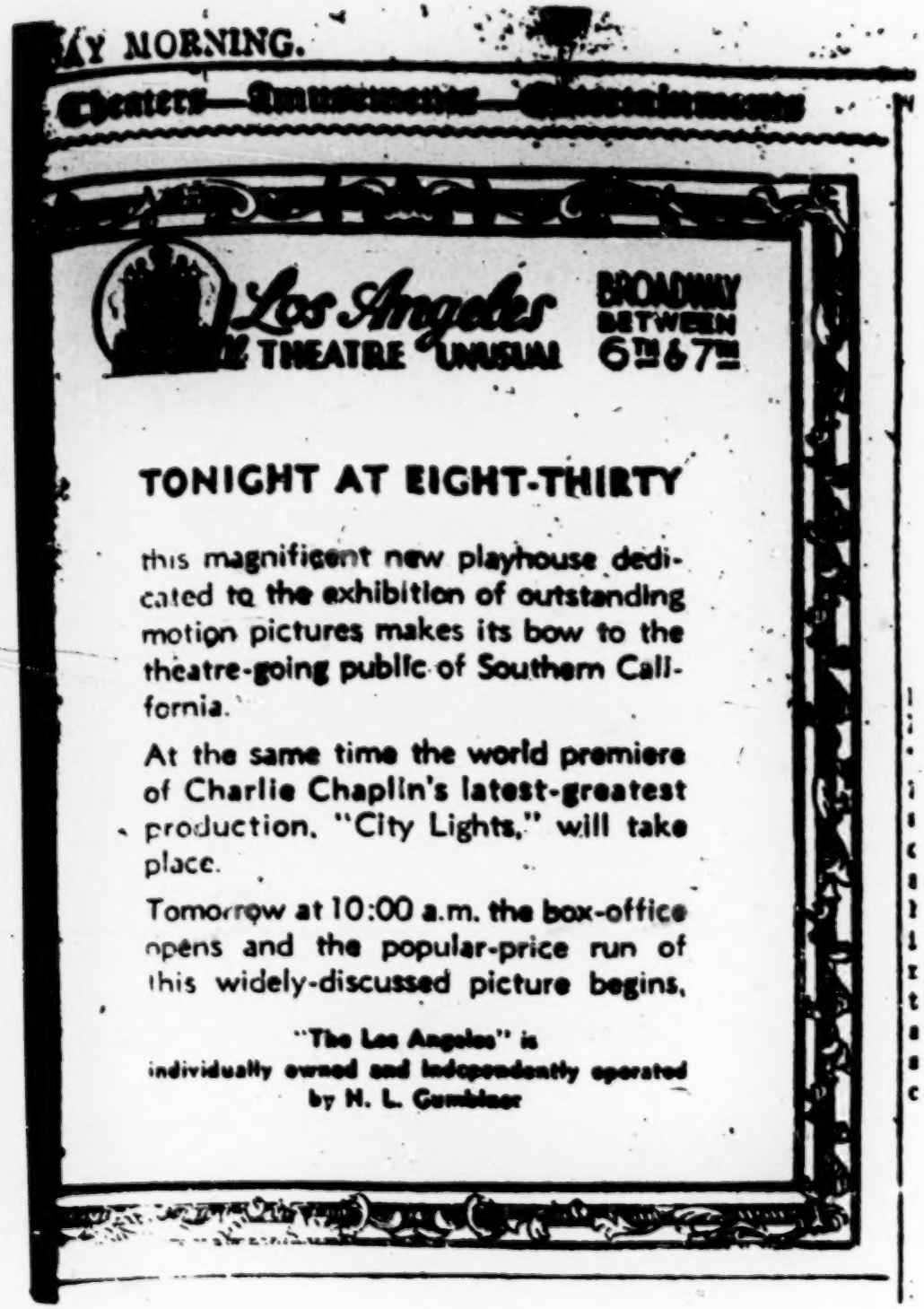
H. L. GUMBINER

Subscribed and sworn to before me
this 2nd day of February, 1935.

MABEL C. DUVALL
Notary Public in and for the County
of Los Angeles, State of California

[NOTARIAL SEAL]

Defendant's Exhibit M



...Y MORNING.

...enters—...—...

Los Angeles
THEATRE UNUSUAL

BROADWAY
BETWEEN
6TH & 7TH

TONIGHT AT EIGHT-THIRTY

this magnificent new playhouse dedicated to the exhibition of outstanding motion pictures makes its bow to the theatre-going public of Southern California.

At the same time the world premiere of Charlie Chaplin's latest-greatest production, "City Lights," will take place.

Tomorrow at 10:00 a.m. the box-office opens and the popular-price run of this widely-discussed picture begins.

"The Los Angeles" is
individually owned and independently operated
by H. L. Gumbiner

Defendant's Exhibit N

LAST NIGHT THE BRILLIANT AUDIENCE
THAT WITNESSED THE WORLD PREMIERE OF

CHARLIE CHAPLIN

in

"CITY LIGHTS"

PAID TEN DOLLARS A SEAT FOR THE PRIVILEGE!

Now you can see this, **the greatest screen entertainment ever produced by the star comedian,** at POPULAR PRICES.

With the box-office opening daily at 10:00 a. m. performances will be continuous from morning until midnight to afford everyone in Southern California an opportunity to see "the picture the world has been waiting for."

When you visit "The Los Angeles" don't fail to inspect this magnificent **theatre unusual** from the ground floor level to the top balcony. You will see innovations unique and architectural beauty unprecedented.

The Los Angeles

THEATRE UNUSUAL BROADWAY

Independently Owned and Operated by H. L. Gumbiner

Defendant's Exhibit O

IN THE

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

H. L. GUMBINER,

Plaintiff,

vs.

FOX WEST COAST THEATRES, a corporation, Bankrupt, CHARLES P. SKOURAS, WILLIAM H. MOORE, JR. and CHARLES C. IRWIN, as Trustees in Bankruptcy of the Estate of Fox West Coast Theatres, a corporation, Bankrupt, FOX WEST COAST THEATRES CORPORATION, a corporation, PRINCIPAL THEATRES, INC., a corporation, DOWN TOWN THEATRES, INC., a corporation, COMBINED THEATRES CORP., a corporation, FOX COSMOPOLITAN THEATRE CO., LTD., a corporation, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, a corporation, FOX FILM CORPORATION, a corporation, PARAMOUNT PICTURES DISTRIBUTING CO., INC., a corporation, VITAGRAPH, INC., a corporation, R-K-O DISTRIBUTING CORPORATION, INC., a corporation, UNITED ARTISTS CORPORATION, a corporation, COLUMBIA PICTURES CORPORATION, a corporation, UNIVERSAL FILM EXCHANGE, INC., a corporation, FIRST NATIONAL PICTURES, INC., a corporation, CHARLES P. SKOURAS, JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE ONE COMPANY, a corporation, JOHN DOE TWO COMPANY, a corporation, JOHN DOE THREE COMPANY, a corporation, JOHN DOE FOUR COMPANY, a corporation, JOHN DOE FIVE COMPANY, a corporation,

Defendants.

IN EQUITY

No. 520-M

STIPULATION OF DISMISSAL.

IT IS HEREBY STIPULATED AND AGREED, that the above entitled action may be dismissed with prejudice.

Defendant's Exhibit O

Dated at Los Angeles, California, this 3rd day of June, 1935.

H. L. GUMBINER
(H. L. Gumbiner) Plaintiff.

JULES C. GOLDSTONE
(Jules C. Goldstone)

JOHN H. TRACY
(John H. Tracy)
Attorneys for Plaintiff.

IT IS SO ORDERED

PAUL J. McCORMICK
District Judge.

Decree entered and recorded
Jun 6, 1935

..... Clerk

By B. B. HANSEY, Deputy Clerk

A True Copy. Jul 16 1953

Attest, Etc.

EDMUND L. SMITH, Clerk, U. S. District Court
Southern District of California

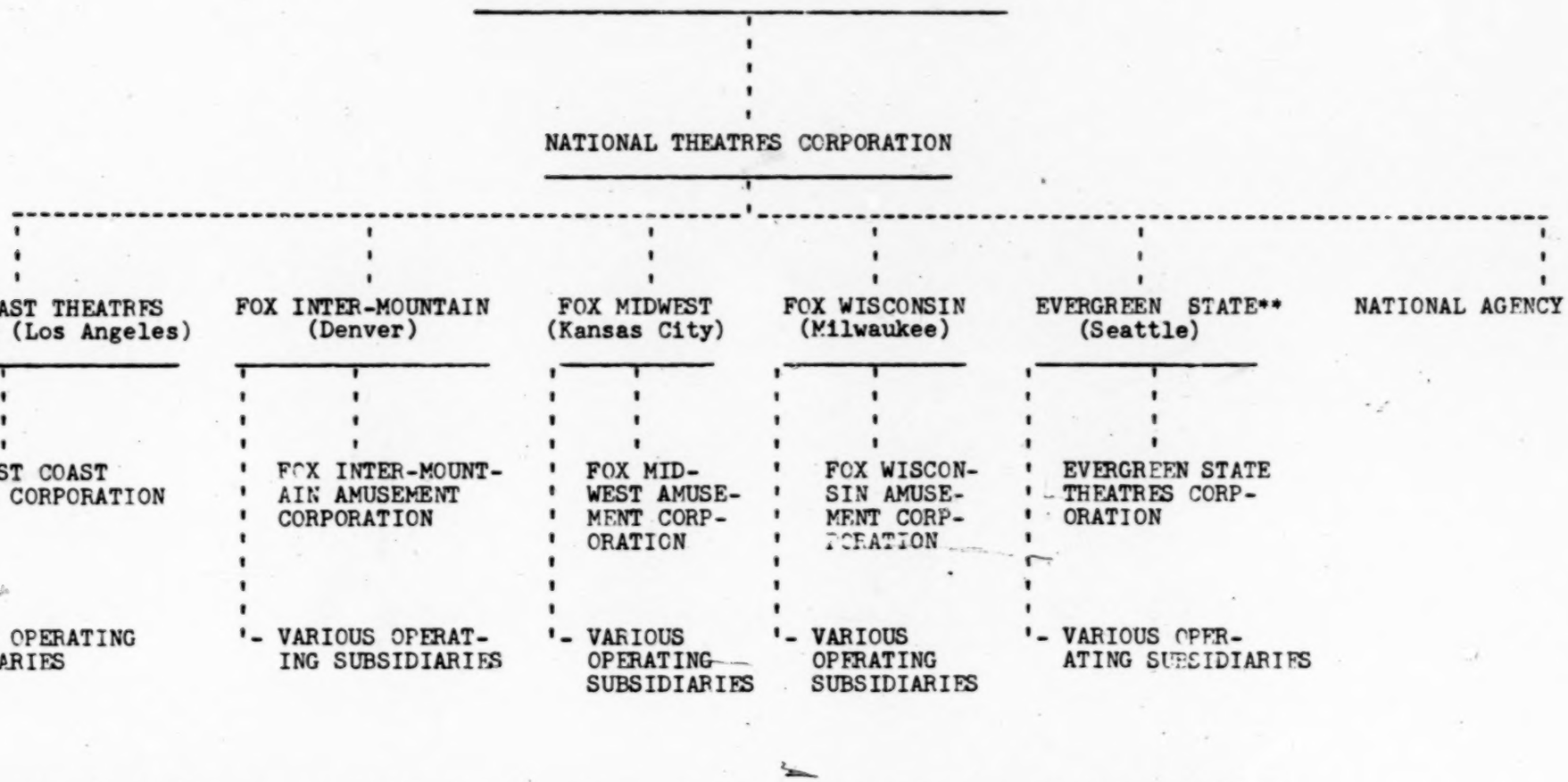
By PHILIP H. HARRIS, Deputy

Defendant's Exhibit P

CHART SHOWING CORPORATE SET-UP OF

NATIONAL THEATRES AND PRINCIPAL SUBSIDIARIES

AFTER SEPTEMBER 28, 1935



*From November 14, 1934 to July 9, 1943, The Chase National Bank of the City of New York owned 58% of National's stock. After July 9, 1943, National again became a wholly-owned subsidiary of Twentieth Century-Fox Film Corporation.

**Not wholly-owned by National, but National had a controlling interest.

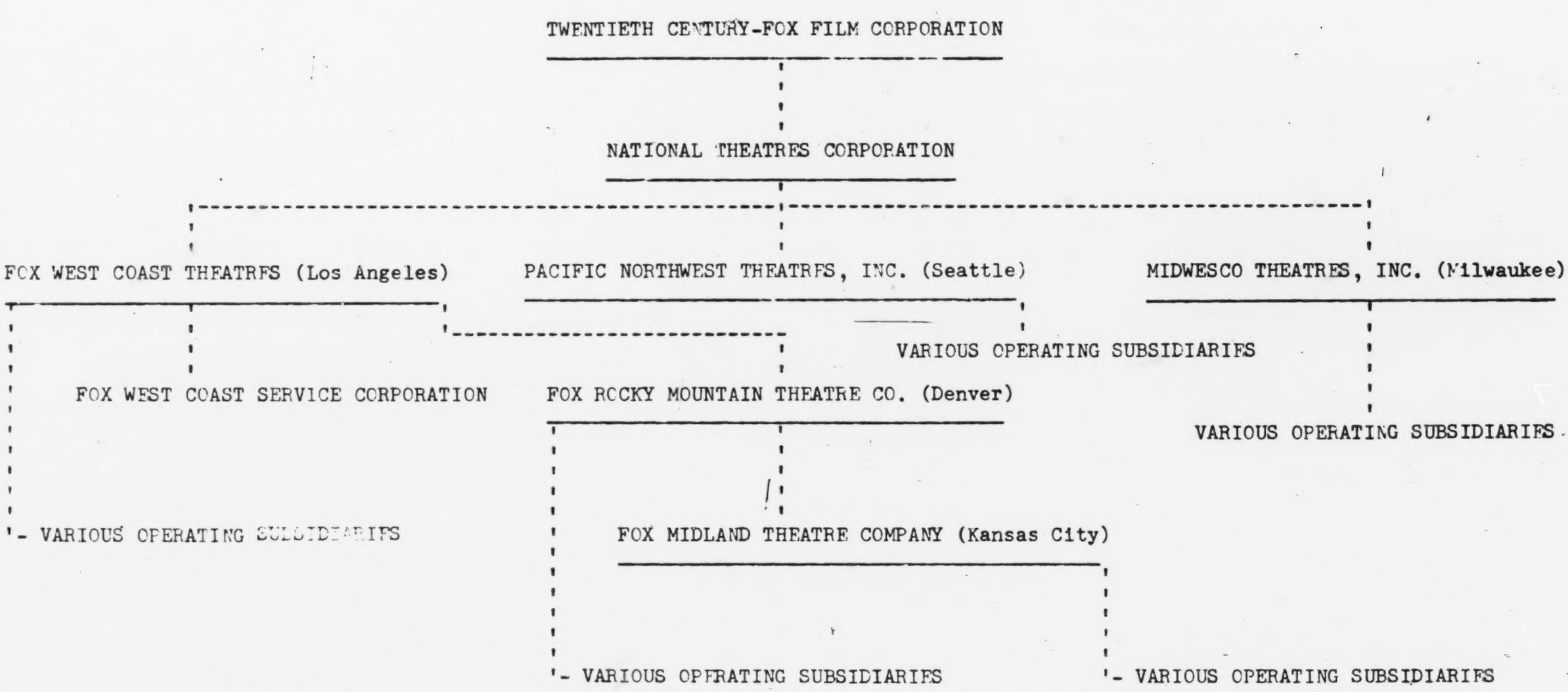
***National Theatres Amusement Co., Inc.

Defendant's Exhibit P

CHART SHOWING CORPORATE SET-UP OF

NATIONAL AND ITS PRINCIPAL SUBSIDIARIES

JANUARY 1930 TO FEBRUARY 1935*



*In February of 1933 there were a number of changes in corporate structure but they were of little importance during this period.

Defendant's Exhibit Q

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

C. S. JENSEN and J. C. VONHERBERG Plaintiffs, *vs.* WESCO CORPORATION, a corporation, et al. Defendants.	No. 346,996 DISMISSAL filed Nov. 9, 1932 J B B

TO THE CLERK OF SAID COURT:

You will enter the dismissal of the above entitled action.

Los Angeles, Cal., November 9, 1932.

LOUIS L. SWARTHE
Attorney for Plaintiff.

NOTE: Where affirmative relief is sought in Answer or Cross-complaint, Dismissal must also be signed by the attorney for the defendant.

Defendant's Exhibit Q

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

C. S. JENSEN, et al. Plaintiff, *vs.* WESCO CORPORATION, et al. Defendants.	No. 346-996 DISMISSAL

LOUIS L. SWARTHE
Attorney for Plaintiffs

Defendant's Exhibit R

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GUMBINER THEATRICAL ENTERPRISES, INC., Plaintiff, —*against*— NATIONAL THEATRES CORPORATION, Defendant.	Civil Action No. 12074

INTERROGATORIES PROPOUNDED TO PLAINTIFF

SIRS:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure defendant hereby requests that plaintiff corporation, by officer or agent thereof, answer under oath within fifteen (15) days after service the following interrogatories:

1. State the name and address of each stockholder of record in plaintiff corporation on February 2, 1935, together with the number of shares of such corporation standing of record in the name of each such stockholder.

2. State the name and address of each stockholder of record in plaintiff corporation on May 22, 1935, together with the number of shares of such corporation standing of record in the name of each such stockholder.

3. State the name and address of each stockholder of record in plaintiff corporation on May 25, 1935, together with the number of shares of such corporation standing of record in the name of each such stockholder.

4. State the name and address of each stockholder of record in plaintiff corporation on June 3, 1935, together

with the number of shares of such corporation standing of record in the name of each such stockholder.

5. State the name and address of each stockholder of record in plaintiff corporation on September 5, 1951, together with the number of shares of such corporation standing of record in the name of each such stockholder.

6. State the name and address of each of the officers of plaintiff corporation on February 2, 1935.

7. State the name and address of each of the officers of plaintiff corporation on May 22, 1935.

8. State the name and address of each of the officers of plaintiff corporation on May 25, 1935.

9. State the name and address of each of the officers of plaintiff corporation on June 3, 1935.

10. State the name and address of each of the officers of plaintiff corporation on September 5, 1951.

Dated: New York, N. Y.
July 14, 1953.

Yours, etc.

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY

By FREDERICK W. R. PRIDE
A Member of the Firm
Attorneys for Defendant
Office & P. O. Address
100 Broadway
New York 5, N.Y.

To:

CORCORAN & KOSTELANETZ
Attorneys for Plaintiff
Office & P. O. Address
52 Wall Street
New York 5, N. Y.

Defendant's Exhibit R

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

GUMBINER THEATRICAL ENTERPRISES, INC., Plaintiff, *against* NATIONAL THEATRES CORPORATION, Defendant.	CIVIL ACTION No. 12074

ANSWERS OF GUMBINER THEATRICAL ENTERPRISES, INC. TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT

Annexed hereto are the answers of Gumbiner Theatrical Enterprises, Inc. to the interrogatories propounded by defendant.

Defendant's Exhibit R

		Shares of Stock
1.	February 2, 1935	
	Bank of America National Trust & Savings Association 660 S. Spring St., Los Angeles	2500
2.	May 22, 1935	
	Bank of America National Trust & Savings Association 660 S. Spring St., Los Angeles	2500
3.	May 25, 1935	
	Bank of America National Trust & Savings Association 660 S. Spring St., Los Angeles	2500
4.	June 3, 1935	
	H. L. Gumbiner, deceased	2500
5.	September 5, 1951	
	H. L. Gumbiner, deceased	2500
6.	February 2, 1935	
	H. L. Gumbiner, deceased	President
	Lee Rosenblum 928 S. Serrano Ave., Los Angeles	Vice-President
	Harry M. Rosenblum 928 S. Serrano Ave., Los Angeles	Secretary

Defendant's Exhibit R

7. May 22, 1935

H. L. Gumbiner, deceased	President
Lee Rosenblum 928 S. Serrano Ave., Los Angeles	Vice-President
Harry M. Rosenblum 928 S. Serrano Ave., Los Angeles	Secretary

8. May 25, 1935

H. L. Gumbiner, deceased	President
Lee Rosenblum 928 S. Serrano Ave., Los Angeles	Vice-President
Harry M. Rosenblum 928 S. Serrano Ave., Los Angeles	Secretary

9. June 3, 1935

H. L. Gumbiner, deceased	President
Lee Rosenblum 928 S. Serrano Ave., Los Angeles	Vice-President
Harry M. Rosenblum 928 S. Serrano Ave., Los Angeles	Secretary

10. September 5, 1951

H. L. Gumbiner, deceased	President
Cora Mogis 4809 Oakwood Ave., Los Angeles	Secretary

Defendant's Exhibit R

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

VILLIS RANDALL, being first duly sworn, deposes and says:

That she is President of Gumbiner Theatrical Enterprises, Inc., the plaintiff in the above entitled proceedings; that the foregoing Answers to Interrogatories propounded by the Defendant are true to the best of her knowledge, information and belief.

VILLIS RANDALL

Subscribed and sworn to before
me this 21 day of October, 1953.
MARY M. COCHRANE MASON
Notary Public in and for said
County and State

Defendant's Exhibit S

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BERTHA BUILDING CORPORATION, Plaintiff, —*against*— NATIONAL THEATRES CORPORATION, Defendant.	Civil Action No. 12073 Interrogatories

INTERROGATORIES PROPOUNDED TO PLAINTIFF

SIRS:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure defendant hereby requests that plaintiff corporation, by officer or agent thereof, answer under oath within fifteen (15) days after service the following interrogatories:

1. State the name and address of each stockholder of record in plaintiff corporation on February 2, 1935, together with the number of shares of such corporation standing of record in the name of each such stockholder.

2. State the name and address of each stockholder of record in plaintiff corporation on May 22, 1935, together with the number of shares of such corporation standing of record in the name of each such stockholder.

3. State the name and address of each stockholder of record in plaintiff corporation on May 25, 1935, together with the number of shares of such corporation standing of record in the name of each such stockholder.

4. State the name and address of each stockholder of record in plaintiff corporation on June 3, 1935, together

Defendant's Exhibit S

with the number of shares of such corporation standing of record in the name of each such stockholder.

5. State the name and address of each stockholder of record in plaintiff corporation on September 5, 1951, together with the number of shares of such corporation standing of record in the name of each such stockholder.

6. State the name and address of each of the officers of plaintiff corporation on February 2, 1935.

7. State the name and address of each of the officers of plaintiff corporation on May 22, 1935.

8. State the name and address of each of the officers of plaintiff corporation on May 25, 1935.

9. State the name and address of each of the officers of plaintiff corporation on June 3, 1935.

10. State the name and address of each of the officers of plaintiff corporation on September 5, 1951.

Dated: New York, N. Y.
July 14, 1953.

Yours, etc.

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY

By FREDERICK W. R. PRIDE
A Member of the Firm
Attorneys for Defendant
Office & P. O. Address
100 Broadway
New York 5, N. Y.

To:

CORCORAN & KOSTELANETZ
Attorneys for Plaintiff
Office & P. O. Address
52 Wall Street
New York 5, N. Y.

Defendant's Exhibit S

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BERTHA BUILDING CORPORATION, Plaintiff, —*against*— NATIONAL THEATRES CORPORATION, Defendant.	Civil Action No. 12073 Answers

ANSWERS OF BERTHA BUILDING CORPORATION TO THE INTERROGATORIES PROPOUNDED BY DEFENDANT

Annexed hereto are the answers of Bertha Building Corporation to the interrogatories propounded by defendant.

Defendant's Exhibit S

		Shares of Stock
1.	February 2, 1935	
	Bank of America National Trust & Savings Association 660 S. Spring St., Los Angeles	750
2.	May 22, 1935	
	Bank of America National Trust & Savings Association 660 S. Spring St., Los Angeles	750
3.	May 25, 1935	
	Bank of America National Trust & Savings Association 660 S. Spring St., Los Angeles	750
4.	June 3, 1935	
	H. L. Gumbiner, deceased	750
5.	September 5, 1951	
	H. L. Gumbiner, deceased	750
6.	February 2, 1935	
	H. L. Gumbiner, deceased	President
	Robert Gumbiner 15146 Moorpark Ave., Sherman Oaks, Calif.	Sec. & Treas.
	Cora Mogis 4809 Oakwood Ave., Los Angeles	Director

Defendant's Exhibit S

7. May 22, 1935

H. L. Gumbiner, deceased	President
Robert Gumbiner 15146 Moorpark Ave., Sherman Oaks, Calif.	Sec. & Treas.
Cora Mogis 4809 Oakwood Ave., Los Angeles	Director

8. May 25, 1935

H. L. Gumbiner, deceased	President
Robert Gumbiner 15146 Moorpark Ave., Sherman Oaks, Calif.	Sec. & Treas.
Cora Mogis 4809 Oakwood Ave., Los Angeles	Director

9. June 3, 1935

H. L. Gumbiner, deceased	President
Robert Gumbiner 15146 Moorpark Ave., Sherman Oaks, Calif.	Sec. & Treas.
Cora Mogis 4809 Oakwood Ave., Los Angeles	Director

10. September 5, 1951

H. L. Gumbiner, deceased	President
Cora Mogis 4809 Oakwood Ave., Los Angeles	Secretary
H. L. Gumbiner, deceased	Treasurer

Defendant's Exhibit S

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

VILLIS RANDALL, being first duly sworn, deposes and says:

That she is President of Bertha Building Corporation, the plaintiff in the above entitled proceeding; that the foregoing Answers to Interrogatories propounded by the Defendant are true to the best of her knowledge, information and belief.

VILLIS RANDALL

Subscribed and sworn to before
me this 21 day of October, 1953.
MARY M. COCHRANE MASON
Notary Public in and for said
County and State

Defendant's Exhibit T

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BERTHA BUILDING CORPORATION, Plaintiff, *—against—* NATIONAL THEATRES CORPORATION, Defendant.	Civil Action No. 12073
and	
GUMBINER THEATRICAL ENTERPRISES, INC. Plaintiff, *—against—* NATIONAL THEATRES CORPORATION, Defendant.	Civil Action No. 12074

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiffs and the attorneys for the defendant, without waiver of plaintiffs' objections to the materiality and relevance thereof, that the books of record of the defendant National Theatres Corporation show that all meetings of the Board of Directors, stockholders and Executive Committee from 1930 to 1949 were held as set out below.

In 1930 six meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New York.

Defendant's Exhibit T

In 1931 nine meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New York.

In 1932 six meetings of the Board of Directors and three meetings of the stockholders of National Theatres Corporation were held in New York.

In 1933 thirteen meetings of the Board of Directors of National Theatres Corporation were held in New York and one meeting of the stockholders was held in Delaware.

In 1934 twenty meetings of the Board of Directors, seven meetings of the stockholders and five meetings of the Executive Committee of National Theatres Corporation were held in New York.

In 1935 eight meetings of the Board of Directors and twenty-nine meetings of the Executive Committee of National Theatres Corporation were held in New York. One meeting of stockholders was held in Delaware.

In 1936 a meeting of the Executive Committee of National Theatres Corporation was held in New York on January 3rd. On April 9, 1936, a meeting of the Board of Directors was held in New York. Four meetings of the Board of Directors and one meeting of stockholders were held in New Jersey. The first Board meeting was held on June 9, 1936.

In 1937 three meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New Jersey.

In 1938 two meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New Jersey.

Defendant's Exhibit T

In 1939 four meetings of the Board of Directors and two meetings of the stockholders of National Theatres Corporation were held in New Jersey.

In 1940 seven meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New Jersey.

In 1941 seven meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New Jersey.

In 1942 nine meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New Jersey.

In 1943 ten meetings of the Board of Directors and one meeting of the stockholders of National Theatres Corporation were held in New Jersey.

In 1944 one meeting of the Board of Directors (January 26, 1944) and one meeting of the stockholders (June 13, 1944) of National Theatres Corporation were held in New Jersey. Eleven meetings of the Board of Directors were held in New York, the first being on April 5th.

In 1945 nine meetings of the Board of Directors of National Theatres Corporation were held in New York and one meeting of stockholders was held in New Jersey.

In 1946 nine meetings of the Board of Directors of National Theatres Corporation were held in New York.

In 1947 ten meetings of the Board of Directors of National Theatres Corporation were held in New York and one meeting of stockholders was held in Delaware.

Defendant's Exhibit T

In 1948 seven meetings of the Board of Directors of National Theatres Corporation were held in New York and one meeting of stockholders was held in Delaware.

In 1949 nine meetings of the Board of Directors of National Theatres Corporation were held in New York.

Dated: New York, N. Y.
February 6, 1956.

/s/ CORCORAN KOSTELANETZ & GLADSTONE
Attorneys for the Plaintiffs

/s/ DWIGHT ROYALL HARRIS KOEGEL & CASKEY
Attorneys for the Defendant

Plaintiffs' Exhibit 19

HOLDING COMPANY SERVICE CONTRACT

Jersey City, N. J.
December 2, 1935

National Theatres Corporation,
Jersey City,
New Jersey.

Dear Sirs:–

We are rendering or propose to offer to render operating and/or supervisory services, directly or through other corporations (hereinafter referred to as "other service corporations"), to a number of your direct or indirect subsidiary corporations and other corporations and entities, owning, holding under lease or sublease and/or operating, or having an interest in the operation of, theatres, theatrical enterprises and other properties, as well as to certain of your subsidiaries and other corporations or entities having service or operating contracts or arrangements with other operating companies, in connection with the performance of such other contracts. All of your said subsidiaries and the other corporations or entities to whom we shall from time to time furnish services are hereinafter sometimes referred to as the "Serviced Companies".

You are familiar with the present form of our contracts with other service corporations, with the present form of contracts between such other service corporations and the Serviced Companies, and also with the service or operating contracts proposed to be assigned to or performed by such other service corporations, and, in order to assist us in the performance of our contemplated duties under the foregoing contracts, you have on this day assigned to us, pur-

suant to a letter agreement of assignment and assumption, all of your rights to the services of Messrs. Charles P. Skouras and Spyros P. Skouras (hereinafter called the "Managers") under a certain contract (hereinafter called the "Skouras contract"), between you and the Managers dated June 13, 1935, to the extent and subject to all the terms and conditions more particularly set forth in said letter agreement.

In the performance of our contracts with the other service corporations, we will acquire and maintain a detailed familiarity with all of the properties, affairs and business of the Serviced Companies. Our organization will include, in addition to the Managers and in addition to the other executives, officers, accountants, bookkeepers, film bookers, advertising specialists and other employees and agents required in the performance by us of operating, supervisory and other services contemplated by the various service contracts above referred to, accountants, bookkeepers, stenographers and other officers, employees and agents of a kind, character and number believed by us to be adequate, together with the services of the Managers, in providing material and valuable assistance to you in the executive and supervisory services now performed by you, and in the handling of general corporate, accounting and other financial problems arising in connection with your ownership, directly or indirectly through stock ownership, of the Serviced Companies.

We submit the following offer for our services in connection with your business and affairs, your supervision, if any of the management of the properties, business and affairs of the Serviced Companies, and in connection with the protection and enhancement of your investment therein. It is understood that in performing services herein, we will

function with your officers and subject always to the direction and control of your Board of Directors or Executive Committee.

1. We will keep ourselves informed of the daily results of theatre operation of the Serviced Companies and will furnish to you weekly statements of profit and loss of each theatre of the Serviced Companies, weekly statements of the cash position of each of the Serviced Companies, monthly statements of operations showing net income by companies and profit and loss of each theatre, budget statements and quarterly balance sheet and income statements of the Serviced Companies, including cumulative statements of theatre profit and loss by companies. We will also furnish or cause to be furnished to you such other financial statements relating to the business and affairs of the Serviced Companies as you may from time to time request.

2. We will keep ourselves informed of the properties of each of the Serviced Companies and of the nature of their respective interests therein and we will promptly advise you of any changes in said properties or in the nature of said interests, including, without limitation, rent reductions, modifications or extensions of leases, the cancellation of existing leases, the loss, sale or other disposal of other properties, and the acquisition of new leases or other properties by any of the Serviced Companies either by way of purchase of stock in other corporations, by purchase of the fee of or leasehold interest in such properties or otherwise, and will, in general, keep you informed of all changes in connection with the theatres and other properties of such Serviced Companies. We will also, if and when requested by you, prepare and deliver or cause to be delivered to you such tabulations, schedules or lists of the various theatres

or other properties from time to time owned, held under lease or sublease and/or operated by said Serviced Companies or any of them, as you may require, including, without limitation, detailed analyses of leases, fee properties, and operating arrangements or contracts.

3. We will keep ourselves informed of the corporate affairs of each of the Serviced Companies and will from time to time advise you of any changes in the personnel of the directors, officers and/or employees of such companies, of any material changes in the by-laws thereof and of any amendments to their certificates of incorporation and furnish you, from time to time, with copies of any such amendments. We will prepare and furnish to you corporate data sheets of each of said companies, showing the names of the officers and directors, the state of incorporation together with the names of states in which qualified to do business, the properties, including the nature of the corporation's interest therein, dates of annual meeting of stockholders and other pertinent corporate information.

4. We will maintain your books of account, and perform such other bookkeeping and accounting functions as your business shall require, including the furnishing of statistics for, and assistance in the preparation of, annual and other reports, tax returns and similar matters, but excluding annual audits.

5. We will study the accounting methods from time to time employed by the Serviced Companies and by or for you, and will, from time to time, make such recommendations for improvements therein as may appear to us in the interest of said companies and/or your company.

Plaintiffs' Exhibit 19

6. We will, in general, study the operation of the theatres and other properties of the Serviced Companies, the different phases of motion picture operating activities and problems, including day to day operation, film purchasing and booking, advertising, stage presentation, extensions, betterments, real estate contracts, purchases, insurance, efficiency and betterment policies, company organization, relations with employees, new developments, financing and special operating studies and investigations, and will, from time to time, advise you, or, at your request, the officers of the Serviced Companies or any of them, of any improvements which may seem to us desirable for the protection and enhancement of your investment in such companies. We will also consult with your officers, or, at your request, with the officers of any Serviced Company, or make recommendations or act as your agent with respect to the purchase, sale, lease or other disposition of properties and enterprises by you or any of the Serviced Companies, the projection or building of new theatres or other transactions of a similar nature.

7. We will at your request accept an assignment and assume the obligations of that certain lease dated December 28, 1934 between Walter G. Winne and William W. Kamm as Trustees The Union Labor Investment Corporation, as Lessor, and your corporation, as Lessee, and, in such event, will provide for you, in the State of New Jersey, such office space as you may require for the purposes of your affairs, and will also provide for you, in such office space, such accounting, bookkeeping and stenographic services, and such equipment and supplies as you may require in the day to day operation of your business.

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8. We will supervise and make recommendations as to the management, leasing or renting of any stores, offices or other real property which you control and/or operate. Upon authorization from you, we will employ independent brokers and contract with them for the payment by you of the usual commissions.

9. As compensation for the services to be performed by us hereunder, you shall pay to us the sum of Three Thousand ($3,000) Dollars per week on each Friday, in advance.

This offer, when accepted by you, will become a contract between us, effective as of the close of business on September 28, 1935, to remain in effect until the close of business on December 31, 1944; provided, however, that it may be terminated by either of us at the end of any calendar month, by written notice given not less than ten (10) days prior to the end of any such month; and provided further that if the Skouras contract should at any time be terminated this contract shall cease and determine at the same time.

Very truly yours,

NATIONAL AGENCY CORPORATION

By A. S. GAMBEE
Vice President

The foregoing proposal is hereby accepted this 3rd day of December, 1935.

NATIONAL THEATRES CORPORATION

By H. C. Cox
Vice President

Plaintiffs' Exhibit 20

ASSIGNMENT OF SKOURAS CONTRACT

December 2, 1935

National Agency Corporation,
26 Journal Square,
Jersey City, New Jersey.

Dear Sirs:—

We have entered into a contract dated June 13, 1935 (hereinafter sometimes referred to as the "Skouras contract") with Messrs. Charles P. Skouras and Spyros P. Skouras (hereinafter referred to as the "Managers") under which, among other things, we are entitled to their services in connection with the supervision and operation of theatres and theatrical enterprises of our subsidiaries and business and affairs thereof as described in such contract. Your acceptance hereof will be an acknowledgment that a copy of such contract has been furnished you and that you are familiar with the terms and provisions thereof.

We understand that you are rendering or propose to offer to render operating and supervisory services, directly or through other corporations (hereinafter referred to as "other service corporations"), to various corporations or other entities operating, or having an interest in the operation of theatres, theatrical enterprises and other properties, as well as to certain other corporations or entities having service or operating contracts or arrangements with other companies and entities engaged in the operation of theatres and theatrical enterprises in connection with the performance of such contracts. All of the corporations or other entities to whom you or the other service corporations shall from time to time so render services are hereinafter sometimes referred to as the "Serviced Companies".

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We are familiar with the present form of your service contracts with other service corporations, with the present forms of service contracts between such other service corporations and the Serviced Companies, and with the service contracts presently proposed to be assigned to or performed by such other service corporations.

We hereby make you the following offer:

1. We will, and upon your acceptance hereof do hereby, assign to you (without representations, covenants or warranties of any kind or character whatsoever, express or implied, and subject to all of the provisions of the Skouras contract) our rights under the Skouras contract to services of the Managers in connection with the supervision or operation of theatres and theatrical enterprises and business and affairs connected therewith operated or carried on by the Serviced Companies in the territory covered by the Skouras contract, to the extent that such supervision or operation is provided for by your contracts with the other service corporations and your contracts or arrangements, if any, and the contracts and arrangements of such other service corporations with the Serviced Companies, in the forms above referred to or in such other forms as we shall approve. The Managers in rendering services to or through you shall act not as our agents, but solely as your agents and employees and in such official or executive capacity as your Board of Directors shall determine. It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including without limitation the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection; and further that we

Plaintiffs' Exhibit 20

shall be under no liability to you for any action or inaction on our part (even though a breach thereof) in respect of said contract or any matter covered thereby. We will advise you of any notices from the Managers under said contract.

2. By your acceptance hereof, you will be deemed to have accepted the foregoing assignment (subject to all of the provisions of the Skouras contract, including, without limitation, the provisions thereof as to the residences and principal offices of the Managers) and, subject to the provisions of paragraph 3 hereof, to have assumed and agreed to pay to the Managers on the dates when the same become due and payable, (1) the weekly salary commencing with the week beginning September 29, 1935, and (2) the annual additional compensation, if any, of the Managers provided for in the Skouras contract; provided, however, that you shall be obligated to pay only the portion of such annual additional compensation for the year 1935 for which you may be entitled to be reimbursed by the other service corporations pursuant to your respective service contracts with them; it being understood and agreed that the amount of such compensation so to be paid by you shall be reduced by the amount of any salary or other compensation theretofore paid by you or any such other service corporations to the Managers or either of them as officers of your corporation or of such other service corporations, or any of them. It is further understood and agreed that in the event that the Managers, or either of them, shall at any time perform services in connection with the theatres and theatrical enterprises and business and affairs connected therewith, operated or carried on by any of the Serviced Companies or other corporations or entities outside the territory covered by the Skouras contract, we shall reimburse you for such pro-

portion of the weekly salary and annual additional compensation, if any, of the Managers, as the approximate amount of time spent by the Managers, or either of them, in the performance of services outside the territory covered by the Skouras contract bears to the approximate total amount of time spent by the Managers under the Skouras contract.

3. We understand that all or substantially all of your income will be derived from payments made to you by the other service corporations under your said service contracts with them, and that in all probability such income will not be sufficient to cover the entire amount of the weekly salary and annual additional compensation, if any, of the Managers and also the other expenses of your corporation referred to in your said service contracts with other service corporations. We hereby agree that your assumption agreement hereinabove in paragraph 2 contained shall be subject to the payment by us to you of the weekly compensation provided for in paragraph 9 (and any and all amendments thereof) of the service contract between us executed today, a copy of which service contract is hereto annexed, marked Exhibit A; and that if we shall at any time make default in the payment of such compensation to you your sole remedy in the premises shall be to serve upon us written notice electing to terminate this agreement and upon the tenth day after the giving of such notice this agreement shall cease, determine and come to an end.

This proposal, when accepted by you, will become a contract between us effective as of the close of business on the 28th day of September, 1935 to remain in force and effect until the close of business on the Saturday nearest December 31, 1944; provided, however, that it may be

Plaintiffs' Exhibit 20

terminated by either of us at the end of any fiscal year (as defined in your contracts with other service corporations) by written notice given at least thirty (30) days prior to the end of any such year; and provided further that if the Skouras contract shall be terminated prior to said date, as therein provided, this contract shall terminate at the same time.

If this contract be terminated for any reason whatsoever, you will forthwith reassign to us without consideration or payment all rights under the Skouras contract hereinabove assigned to you, and, thereupon, you will be relieved of all obligations under said contract or hereunder accruing after the date of such reassignment.

Very truly yours,

NATIONAL THEATRES CORPORATION

By A. S. GAMBEE
Vice President

The foregoing proposal is
hereby accepted this 3rd
day of December, 1935.

NATIONAL AGENCY CORPORATION

By H. C. Cox
Vice President

Plaintiffs' Exhibit 21

Part

Jersey City, N. J.
December 2, 1935.

Fox West Coast Agency Corporation,
1837 South Vermont Avenue.
Los Angeles, California.

Dear Sirs:

We are organized to furnish operating and/or supervisory services, directly or through other corporations (hereinafter referred to as "other service corporations"), to corporations or other entities (hereinafter sometimes called "Operating Companies") owning, holding under lease or sublease and/or operating, or having an interest in the operation of, motion picture theatres, theatrical enterprises or other properties; to corporations or other entities having service or operating contracts with Operating Companies which desire our services in connection with such contracts, and also to certain of the direct or indirect parent corporations (hereinafter sometimes called "Holding Companies") of Operating Companies.

Our organization will include theatre executives, accountants, bookkeepers, film bookers, advertising specialists, and other officers, employees and agents required in the performance of theatre operating services under this and/or other service contracts and in advising upon the different phases of motion picture theatre operating activities and problems, including day to day operating, film purchasing and booking, advertising, stage presentation, extension, betterments, real estate, contracts, purchases, insurance, accounting, company organization, efficiency and betterment studies, relations with employees, new developments, financ-

ing, and special operating studies and investigations. Our expenses hereinafter referred to will include corporate, overhead and other expenses, reasonable salaries for our officers and employees, and taxes and other charges involved in the carrying on of our business and the performance of this and other service contracts, and may also include additional compensation for one or more of such officers and/or employees calculated on the basis of the consolidated net profits of the Operating Companies serviced by us and/or others, or otherwise.

We are familiar with your usual form of service contract with Operating Companies served or to be served by you, and also with the forms of other service contracts which you propose to enter into with Operating Companies or others.

We submit the following proposal for our services in connection with your supervision and operation of theatres or theatrical enterprises or other properties of Operating Companies having service contracts with you from time to time, or of Operating Companies having contracts with corporations or other entities which have a contract with you calling for your performance of such contracts or receiving services under service or management contracts assigned to you; and in connection with the properties and affairs of Holding Companies having service contracts with you from time to time. Operating Companies having your usual form service contracts are herein referred to as "Local Companies", and those receiving your services under other forms of contracts or under assigned contracts or through other corporations above referred to are hereinafter sometimes referred to as "Serviced Companies". Holding Companies receiving your services from time to time are hereinafter referred to as "Local Holding Com-

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panies". It is understood that in performing services hereunder we will function in cooperation with your officers and employees and subject always to the direction and control of your Board of Directors, and subject also, if we shall manage or act for any Local, Serviced or Local Holding Company, to the direction and control of its Board of Directors.

1. We will keep ourselves informed of the conditions and requirements of the theatres, theatrical enterprises or other properties (serviced by you) of your Local Companies, Serviced Companies and Local Holding Companies, and will consult with and advise your officers and employees in their work. We will make recommendations for effecting improvements in operation and advise you as to policies and methods of operation which appear to us in the interests of said Companies. Our services shall include consultation and advice in regard to all services to be performed by you for said Companies and in particular will include the following, all of which (unless the context expressly otherwise indicates) shall be performed as your agent and for the account and risk of said companies:

(a) We will use our best efforts to lease, license and/or obtain for your Local and Serviced Companies motion picture films, stage talent and other theatrical productions and entertainments (hereinafter sometimes referred to as "productions") of a kind and number deemed by you and us sufficient for their theatres and theatrical enterprises, having in mind their operating policies, and to that end may negotiate and contract for productions. Contracts for productions may be made either directly with the distributors or otherwise, and either for productions for the theatres of one of such Local or Serviced Companies alone or for them and theatres of other Operating Companies.

Plaintiffs' Exhibit 21

It is understood that we may contract for productions for the theatres operated by your Local and/or Serviced Companies, for a consideration which may or may not produce a profit for the corporation or corporations producing or distributing the same, regardless of the relationship of any such corporation or any directors, officers and/or employees thereof to our corporation and/or any parents, subsidiaries or affiliates thereof.

(b) We will advise you as to the placing and renewal of fire, liability and other insurance for your Local, Serviced and Local Holding Companies and, if requested by you, will, to the extent authorized by such Companies, contract for such insurance either by individual policies on separate properties (or risks) or by blanket policies covering all or any part of the properties (or risks) of any one or more of the Operating Companies, Holding Companies or others.

(c) We will advise you as to advertising policies for the theatres and theatrical enterprises of your Local and Serviced Companies and, to the extent authorized by such Companies, will contract for such advertising space, programs, supplies and/or services as may be deemed advisable. Any contracts so authorized may also be made jointly for several Operating Companies or with any corporation approved by us advertising jointly for several Operating Companies, in either case so as to obligate each Company for a fair proportion of the cost thereof.

(d) If you so request, we will, to the extent authorized by your Local, Serviced and Local Holding Companies, contract for the making of ordinary repairs, renewals and replacements in the theatre buildings, equipment and other

Plaintiffs' Exhibit 21

properties of such Companies, including the purchase or sale of any materials or equipment required or sold in connection therewith.

(e) If you so request, we will also, to the extent authorized by your Local, Serviced and Local Holding Companies, contract for the purchase generally of theatre and/or other equipment and supplies (including, without limitation, fuel, electricity, heat, water and other similar supplies) which are necessary or desirable for the operation or maintenance of the properties and enterprises of such Companies, or for the sale of any such equipment or supplies no longer needed. If we find it possible, said Companies will receive the benefit of any lower prices resulting from quantity purchases made by us for other Operating Companies, and/or Holding Companies.

We or another party approved by us may purchase and hold in stock supplies and equipment required for the operation of theatre properties and enterprises and may then from time to time, upon requisition from your Local, Serviced and Local Holding Companies, sell to them, through us as agent, such part of such supplies and equipment as shall be required in the operation of their properties and enterprises, or for any renewals, repairs or replacements thereof, at cost plus estimated handling and carrying charges.

(f) We will also give you our services in connection with any special matters outside of the ordinary supervision or operation of theatres or other properties and enterprises, as, for example, the purchase, sale, lease or other disposition of properties or enterprises, the projection or building of new theatres, or any other transactions outside of the scope of ordinary theatre or business operation.

Plaintiffs' Exhibit 21

2. Contracts entered into by us as your agent on behalf of your Local, Serviced or Local Holding Companies, as provided in paragraph 1 above, shall be made either in the name of such Local, Serviced or Local Holding Company by us as sub-agent of your corporation acting as agent or sub-agent of such Company, or in your name as agent or sub-agent of such Local, Serviced or Local Holding Company by us as sub-agent of your corporation, and neither we nor you shall be under any pecuniary or other liability by reason of any such contract. It is understood that we shall make contracts or take action as your agent with regard to any particular Local, Serviced or Local Holding Company only to the extent that such services or action are contemplated by the service contracts made or to be made by, or assigned to, you.

* * * *

4. We may obtain, directly or through others, such legal services and advice (outside our own organization) as we deem desirable in connection with any services to be rendered to Operating or Holding Companies by us, directly or through you or other service corporations, and, if we and you so determine, we may employ, directly or through others, one of the following firms of accountants for the purpose of auditing the books of any or all of the Operating or Holding Companies so serviced, namely, Lybrand, Ross Bros. & Montgomery, Price, Waterhouse & Co., Touche, Niven & Co., Haskins & Sells, Arthur Young & Company, Arthur Andersen & Co., or Peat, Marwick, Mitchell & Co.

* * *

This proposal, when accepted by you, will become a contract between us, effective as of the close of business on September 28, 1935, to remain in force and effect until

Plaintiffs' Exhibit 21

December 31, 1944, provided, however, that it may be terminated by mutual agreement or by either of us at the end of any of our fiscal years by written notice given not less than thirty (30) days before the end of such year.

Very truly yours,

NATIONAL AGENCY CORPORATION

By A. S. GAMBEE
Vice President

The foregoing proposal is hereby accepted this 16th day of December, 1935.

FOX WEST COAST AGENCY CORPORATION

By CHARLES A. BUCKLEY
Vice President

Plaintiffs' Exhibit 26

HOLDING COMPANY SERVICE CONTRACTS

Los Angeles, California
December 2, 1935.

Fox West Coast Theatres Corporation,
1837 South Vermont Avenue,
Los Angeles, California.

Dear Sirs:—

We are rendering or propose to offer to render operating and/or supervisory services to a number of corporations or other entities, including, without limitation, certain of your direct or indirect subsidiaries, (hereinafter sometimes referred to as "Operating Companies") owning, holding under lease or sublease and/or operating or having an interest in the operation of, theatres, theatrical enterprises and other properties, as well as to certain of the direct or indirect parent corporations of Operating Companies, and also to certain other corporations or entities having service or operating contracts or arrangements with other Operating Companies in connection with the performance of such contracts.

We have a contract (hereinafter referred to as the "Principal Contract") with National Agency Corporation (hereinafter referred to as "National"), under the terms of which we are entitled to its advice and services in the operation or supervision of the properties or enterprises of Operating Companies and in the supervision of the business and affairs of certain of the direct or indirect parent corpo rations of Operating Companies. A copy of the Principal Contract has heretofore been furnished to you and your acceptance hereof will be an acknowledgment of your receipt

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thereof and that you are familiar with and approve of the provisions of said contract. You are also familiar with the usual form of our contracts with Operating Companies and also with the services of operating contracts proposed to be assigned to or performed by us.

In the performance of our contracts with the Operating Companies, we will acquire and maintain a detailed familiarity with all of the properties, affairs and business of the Operating Companies which are your direct or indirect subsidiaries (hereinafter sometimes referred to as "Serviced Subsidiaries"). Our organization will include, in addition to the executives, officers, accountants, bookkeepers, film bookers, advertising specialists and other employees and agents required in the performance by us of operating, supervisory and other services contemplated by the various service contracts above referred to, accountants, bookkeepers, stenographers and other officers, employees and agents of a kind, character and number believed by us to be adequate in providing material and valuable assistance to you in the executive and supervisory services now performed by you, and in the handling of general corporate, accounting and other financial problems arising in connection with your ownership, directly or indirectly through stock ownership, of the Serviced Subsidiaries.

We submit the following offer for our services in connection with your business and affairs, your supervision, if any, of the management of the properties, business and affairs of the Serviced Subsidiaries, and in connection with the protection and enhancement of your investment therein. It is understood that in performing services herein, we will function with your officers and subject always to the direction and control of your Board of Directors.

1. We will keep ourselves informed of the daily results of theatre operation of the Serviced Subsidiaries and

will furnish to you weekly statements of profit and loss of each theatre of the Serviced Subsidiaries, weekly statements of the cash position of each of the Serviced Subsidiaries, monthly statements of operations showing net income by companies and profit and loss of each theatre, budget statements and quarterly balance sheet and income statements of the Serviced Subsidiaries, including cumulative statements of theatre profit and loss by companies. We will also furnish or cause to be furnished to you such other financial statements relating to the business and affairs of the Serviced Subsidiaries as you may from time to time request.

2. We will keep ourselves informed of the properties of each of the Serviced Subsidiaries and of the nature of their respective interests therein and we will promptly advise you of any changes in said properties or in the nature of said interests, including, without limitation, rent reductions, modifications or extensions of leases, the cancellation of existing leases, the loss, sale or other disposal of other properties, and the acquisition of new leases or other properties by any of the Serviced Subsidiaries either by way of purchase of stock in other corporations, by purchase of the fee of or leasehold interest in such properties or otherwise, and will, in general, keep you informed of all changes in connection with the theatres and other properties of such Serviced Subsidiaries. We will also, if and when requested by you, prepare and deliver or cause to be delivered to you such tabulations, schedules or lists of the various theatres or other properties from time to time owned, held under lease or sublease and/or operated by said Serviced Subsidiaries or any of them, as you may require, including, without limitation, detailed analyses of leases, fee properties, and operating arrangements or contracts.

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3. We will keep ourselves informed of the corporate affairs of each of the Serviced Subsidiaries and will from time to time advise you of any changes in the personnel of the directors, officers and/or employees of such companies, of any material changes in the by-laws thereof and of any amendments to their certificates of incorporation and furnish you, from time to time, with copies of any such amendments. We will prepare and furnish to you corporate data sheets of each of said companies, showing the names of the officers and directors, the state of incorporation together with the names of states in which qualified to do business, the properties, including the nature of the corporation's interest therein, dates of annual meeting of stockholders and other pertinent corporate information.

4. We will maintain your books of account, and perform such other bookkeeping and accounting functions as your business shall require, including the furnishing of statistics for, and assistance in the preparation of, annual and other reports, tax returns and similar matters, but excluding annual audits.

5. We will study the accounting methods from time to time employed by the Serviced Subsidiaries and by or for you, and will from time to time, make such recommendations for improvements therein as may appear to us in the interest of said companies and/or your company.

6. We will, in general, study the operation of the theatres and other properties of the Serviced Subsidiaries, the different phases of motion picture operating activities and problems, including day to day operation, film purchasing and booking, advertising, stage presentation, extensions, betterments, real estate, contracts, purchases, insurance, efficiency and betterment policies, company organiza-

tion, relations with employees, new developments, financing and special operating studies and investigations, and will, from time to time, advise you, or at your request, the officers of the Serviced Subsidiaries or any of them, of any improvements which may seem to us desirable for the protection and enhancement of your investment in such companies. We will also consult with your officers, or, at your request, with the officers of any Serviced Subsidiary, or make recommendations or act as your agent with respect to the purchase, sale, lease or other disposition of properties and enterprises by you or any of the Serviced Subsidiaries, the projection or building of new theatres or other transactions of a similar nature.

7. We will provide for you, in Los Angeles, California, such office space as you may require for the purposes of your affairs, and will also provide for you, in such office space, such accounting, bookkeeping and stenographic services, and such equipment and supplies as you may require in the day to day operation of your business.

8. We will supervise and make recommendations as to the management, leasing or renting of any stores, offices or other real property which you control and/or operate. Upon authorization from you, we will employ independent brokers and contract with them for the payment by you of the usual commissions.

9. As compensation for the services to be performed by us hereunder, you shall pay to us the sum of Five Hundred ($500.) Dollars per week on each Friday in advance.

This offer, when accepted by you, will become a contract between us, effective as of the close of business on Septem-

Plaintiffs' Exhibit 26

ber 28, 1935, to remain in effect until the close of business on December 31, 1944; provided, however, that it may be terminated by either of us at the end of any calendar month, by written notice given not less than ten (10) days prior to the end of any such month.

Very truly yours,

FOX WEST COAST AGENCY CORPORATION

By GEORGE TOPPER
Vice President

The foregoing proposal is hereby accepted this 17th day of December, 1935.

FOX WEST COAST THEATRES CORPORATION

By CHARLES A. BUCKLEY
Vice President

Plaintiffs' Exhibit 28

GUARANTY OF STANDARD SERVICE CONTRACT

Los Angeles, California,
September 19, 1938.

Fox West Coast Agency Corporation,
1609 West Washington Boulevard,
Los Angeles, California.

Dear Sirs:

In order to induce you to enter into service contracts in substantially the form hereto annexed with one or more of our direct or indirect subsidiaries, and to render operating, supervisory and other services to them pursuant thereto, we hereby covenant and agree with you as follows:

(a) We unconditionally guarantee the prompt and punctual payment of all compensation and other amounts which shall be payable to you under any such contracts made with such subsidiaries; and

(b) We unconditionally guarantee the prompt and punctual payment to you by our said subsidiaries of all obligations incurred by them to you for equipment and/or supplies sold to them by you, and/or for special services rendered to them by you, pursuant to the provisions of such service contracts;

and that all of the provisions hereof are for the benefit also of National Theatres Amusement Co., Inc. to the extent

that any amounts payable by our said subsidiaries under any such contracts represent or are based upon amounts payable by you on account of expenses of or your commitments to said National Theatres Amusment Co., Inc., which may enforce any of the provisions hereof to said extent.

In this connection we further agree that we will, if and at such time or times as you so determine, pay to you a deposit or deposits in anticipation of any amounts payable hereunder, the amount thereof to be mutually agreed upon between us. If any such deposit or deposits be made, it is understood that you will apply the same in payment of any sum or sums from time to time owing by us hereunder.

We hereby consent to any modification of any such service contract agreed upon between you and our subsidiary with which such contract is made, and agree that no such modification shall affect our liability hereunder, provided that our liability hereunder shall not be increased by any such modification made without our consent or approval. We hereby waive any and all demands for payment and notice of default and agree that our liability hereunder shall not be affected by any extension of time or indulgence granted to any of said subsidiaries, or by any failure to enforce against said subsidiaries any obligations hereby guaranteed. If any obligations hereinabove referred to have been or are at any time guaranteed by any other party or parties, or any deposit or deposits have been or are made in respect thereof, our obligations hereunder will be in no way affected thereby and we will have no rights, defenses or interests in respect of any such guarantees or deposits or as a result of any action whatsoever which you may take in respect

Plaintiffs' Exhibit 28

thereto, including without limitation any release or modification of any such guarantees or deposits.

Very truly yours,

FOX WEST COAST THEATRES CORPORATION

By CHARLES A. BUCKLEY
Vice President

Plaintiffs' Exhibit 29
Part

GUARANTEE OF PRINCIPAL SERVICE CONTRACT

December 28, 1944.

National Theatres Amusement Co., Inc.
444 West 56th Street,
New York, N. Y.

Dear Sirs:

In order to induce you to extend the term of the agreement between you and our subsidiary, Fox West Coast Agency Corporation, in the form of a letter dated July 14, 1938 and accepted by Fox West Coast Agency Corporation September 19, 1938 for an additional term expiring on December 25, 1954, unless terminated as therein provided, and to render services to Fox West Coast Agency Corporation pursuant thereto, we hereby covenant and agree with you as follows:

(a) We unconditionally guarantee the prompt and punctual payment when due of all compensation and other amounts which shall be payable to you under such agreement as extended.

(b) We unconditionally guarantee the prompt and punctual payment to you by Fox West Coast Agency Corporation of all obligations incurred by it to you for equipment, supplies and/or special services rendered to it by you pursuant to the provisions of such agreement as extended.

(c) We further agree that we will if and at such time or times as you so determine pay to you a deposit or deposits in anticipation of any amounts payable hereunder

Plaintiffs' Exhibit 29

in such reasonable amounts as you shall demand. If any such deposit or deposits be made it is upon the understanding that you will apply the same in payment of sums from time to time owing by us hereunder, and that upon the termination or expiration of this guarantee you will return to us any such sums not so applied or appliable.

We hereby consent to any modification of such agreement between you and Fox West Coast Agency Corporation and agree that no such modification shall affect our liability hereunder provided that our liability hereunder shall not be increased by any such modification made without our consent or approval. We hereby waive notice of any such modification and waive any and all demands for payment and notice of default and agree that our liability hereunder shall not be affected by any extension of time or indulgence granted to said Fox West Coast Agency Corporation or by any failure to enforce against it any obligations hereby guaranteed. If any obligations hereinabove referred to have been or are at any time guaranteed by any other party or parties or any deposit or deposits, our obligations hereunder will be in no way affected thereby and we will have no rights, defenses or interests in respect of any such guarantees or deposits or as a result of any action whatsoever which you may take in respect thereto including without limitation any release or modification of any such guarantees or deposits.

Very truly yours,

FOX WEST COAST THEATRES CORPORATION

By JOHN B. BERTERO
Vice President

Plaintiffs' Exhibit 31
Part

Guaranty of Service Contracts between
National Agency Corporation and
Subsidiary Agency Corporations.

Jersey City, N. J.,
December 2, 1935.

National Agency Corporation,
26 Journal Square,
Jersey City, N. J.

Dear Sirs:

In order to induce you to enter into service contracts in substantially the form hereto annexed with certain of our indirect subsidiaries, to wit: Fox West Coast Agency Corporation, Fox Inter-Mountain Agency Corporation, Fox Midwest Agency Corporation, and Fox Wisconsin Agency Corporation, and to render operating, supervisory and other services to them pursuant thereto, we hereby covenant and agree with you as follows:

(a) we unconditionally guarantee the prompt and punctual payment of all compensation and other amounts which shall be payable to you under any such contracts made with such subsidiaries; and

(b) we unconditionally guarantee the prompt and punctual payment to you by our said subsidiaries of all obligations incurred by them to you for supplies sold to them by you, and/or for special services rendered to them by you, pursuant to the provisions of such service contracts.

Plaintiffs' Exhibit 31

In this connection we further agree that we will, if and at such time or times as you so determine, pay to you a deposit or deposits in anticipation of any amounts payable hereunder, the amount thereof to be mutually agreed upon between us. If any such deposit or deposits be made, it is understood that you will apply the same in payment of any sum or sums from time to time owing by us hereunder.

We hereby consent to any modifications of any such service contract agreed upon between you and our subsidiary with which such contract is made, and agree that no such modification shall affect our liability hereunder, provided that our liability hereunder shall not be increased by any such modification made without our consent or approval. We hereby waive any and all demands for payment and notice of default and agree that our liability hereunder shall not be affected by any extension of time or indulgence granted to any of said subsidiaries, or by any failure to enforce against said subsidiaries any obligations hereby guaranteed. If any obligations hereinabove referred to have been or are at any time guaranteed by any other party or parties, or any deposit or deposits have been or are made in respect thereof, our obligations hereunder will be in no way affected thereby and we will have no rights, defenses or interests in respect of any such guarantees or deposits or as a result of any action whatsoever which you may take in respect thereto, including without limitation any release or modification of any such guarantees or deposits.

Very truly yours,

NATIONAL THEATRES CORPORATION

By A. S. GAMBEE
Vice-President

Plaintiffs' Exhibit 33

STANDARD SERVICE CONTRACT

Taft Theater Company,
Los Angeles, California.

Dear Sirs:

Experience has shown that it is uneconomical for each individual motion picture theatre company to maintain a complete and permanent organization capable of rendering all types of operating and financial service. To meet the requirements of this character of a large number of such companies through a cooperative arrangement, we are offering to furnish operating, supervisory and other services to corporations or other entities (hereinafter sometimes referred to as Operating Companies) owning, holding under lease or sublease and/or operating, or having an interest in the operation of, motion picture theatres, theatrical enterprises or other properties; to corporations or other entities having service or operating contracts with Operating Companies which desire our services in connection with such contracts, and also to certain of the direct or indirect parent corporations (hereinafter sometimes referred to as "Holding Companies") of Operating Companies which desire our services.

* * *

We have a contract (hereinafter referred to as the "Principal Contract") with National Agency Corporation (hereinafter referred to as "National") under which we are entitled to its advice and services in the operation or supervision of the properties and enterprises of Operating and Holding Companies serviced by us. National may also furnish services, either directly or through other corporations (hereinafter referred to as "other service corporations"),

Plaintiffs' Exhibit 33

to other Operating and Holding Companies not serviced by us. A copy of the Principal Contract has heretofore been furnished to you and your acceptance hereof will be an acknowledgment of your receipt of such Contract and that you are familiar with and approve of the provisions thereof, including those as to the amounts to be paid by us on account of the expenses of National and salary and/or additional compensation of its officers, agents and/or employees.

We submit the following proposal for our services (including also the services of National) in the operation or supervision of theatres, theatrical enterprises and other related properties which from time to time are directly operated, controlled or carried on by you (excepting properties and enterprises of other corporations operated by you under any service, operating or other similar contracts and excepting also properties and enterprises operated or carried on by you jointly with one or more other persons or corporations, as a partnership or joint venture). In providing and performing such services, we, as well as National, will function in cooperation with your officers and employees and subject always to the direction and control of your Board of Directors.

A. Operating and Supervisory Services.

1. As your agent and solely for your account and risk and either directly or through National, we will in general supervise the operation of all such properties and enterprises, will familiarize ourselves with, and keep ourselves informed of, the conditions and requirements thereof, and will consult with and advise your officers and employees in their work and make recommendations for effecting improvements in operation, and specifically:

* * *

Plaintiffs' Exhibit 33

(g) To the extent from time to time authorized by you, we will contract for the purchase generally of theatre and/or other equipment and supplies necessary or desirable for the operation or maintenance of your properties and enterprises, or for the sale of any such equipment or supplies no longer needed. If we find it possible, you will receive the benefit of any lower prices resulting from quantity purchases made by ourselves or National for Operating and/or Holding Companies serviced by us and/or other service corporations.

We or National or some other corporation approved by us may purchase and hold in stock supplies and equipment required for the operation of theatre properties and enterprises, and may then from time to time upon your requisition sell to you at cost plus estimated handling and carrying charges, such part of such supplies or equipment as shall be required for your properties and enterprises or for any renewals, repairs or replacements thereof.

* * *

2. Contracts entered into by us on your behalf, as provided in paragraph 1 above, shall be made in your name by us as your agent, or in our name as agent of your corporation, such signature by us as agent in either case to be made by one of our officers or agents, or by National (signing by one of its own officers or agents) as sub-agent, and neither we nor National shall be under any pecuniary or other liability by reason of any such contract.

B. Compensation for Operating and Supervisory Services.

3. As compensation for such services, you agree to pay to us your proportionate share, as hereinafter determined, of our expenses and charges (including without limitation

Plaintiffs' Exhibit 33

the amounts payable by us to National and any additional compensation payable to our officers and employees) after making the deductions hereinafter stated in respect of sums received by us and other service corporations under service or operating contracts different from that herein provided for, as follows:

* * *

4. We and/or National may obtain, directly or through others, such legal services or advice (outside our own organizations) as we deem desirable in connection with the operation or supervision of any one or more (as we may determine) of the properties or enterprises serviced by us or any of said other service corporations. We and/or National may employ, directly or through others, one of the firms of accountants specified in paragraph 1 above for our own account to audit your books and those of Holding Companies and/or other Operating Companies serviced by us.

There shall be allocated to and paid by you, in addition to any compensation provided for in subdivisions (a), (b) and (c) of paragraph 3 above, a fair proportion (as between you and other companies having service contracts contemplating allocation to them of such charges and expenses) of any charges or expenses incurred by us and/or National for any such legal and accounting services or advice rendered for or on your behalf and/or for your benefit or in connection with your affairs.

We will also make available to you, upon request, the services of ourselves and National in connection with any special matters, as for example the purchase, sale, lease or other disposition of properties and enterprises, the projection or building of new theatres, or any other transactions outside of the scope of the ordinary operation of your prop-

erties and enterprises. Our compensation for such services shall be in addition to that provided for in subdivisions (a), (b) and (c) of paragraph 3 above and shall be agreed upon between us with respect to each such matter.

* * *

This proposal when accepted by you will become a contract between us, effective as of the close of business on September 28, 1935, to remain in force and effect until the close of business on the Saturday nearest December 31, 1944, provided, however, that it may be terminated by you at the end of any contract period by written notice to us given not less than thirty (30) days before the end of such contract period, and that it may be terminated by us at the end of any fiscal year by written notice to you given not less than thirty (30) days before the end of such year.

Very truly yours,

FOX WEST COAST AGENCY CORPORATION

By GEORGE TOPPER
Vice President

The foregoing proposal is hereby accepted this 18th day of December, 1935.

TAFT THEATER COMPANY,

By C. A. BUCKLEY
Vice President

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL THEATRES CORPORATION,
PETITIONER,

v.

BERTHA BUILDING CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK W. R. PRIDE,
Attorney for Petitioner
National Theatres Corporation
100 Broadway
New York 5, New York

JOHN F. CASKEY,
Of Counsel.

January 31, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL THEATRES CORPORATION, *Petitioner*, v. BERTHA BUILDING CORPORATION, *Respondent*.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, National Theatres Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Judges L. Hand, Chase and Hincks; Judge Hand dissenting) dated and entered on September 10, 1957. The judgment sought to be reviewed reversed a judgment of the District Court dismissing respondent's complaint as barred by the applicable statute of limitations. The case was remanded for a jury trial of that issue.

Opinions Below

The original opinion of the Court of Appeals and its opinion on re-hearing are reported in 248 F. (2d) 833.* The opinion

*There were two cases tried together on petitioner's defense of the statute of limitations. The plaintiff in the first case was Gumbiner Theatrical Enterprises, Inc., and in the second the respondent here, Bertha Building Corporation. Petitioner National Theatres Corporation was the only defendant in each case. On the petition for re-hearing in both cases the Court of Appeals reversed its original decision in the *Gumbiner Theatrical* case and affirmed the judgment of the District Court, dismissing the complaint.

of the District Court is reported in 140 F. Supp. 909. The findings of fact, conclusions of law and order of dismissal of the District Court are not reported. The opinion of the District Court, directing that the issue of the statute of limitations be tried to the court without a jury, is not reported. All of the foregoing are annexed hereto as an appendix to this petition (*infra*, pages 1-65a).

Jurisdiction

The judgment which is sought to be reviewed by this petition was dated and entered on September 10, 1957. Petitioner's timely motion for a re-hearing was granted. On November 7, 1957, the Court of Appeals rendered a second decision in which it adhered to its original decision.

The jurisdiction of this Court is invoked pursuant to the provisions of Section 1254 (1) of Title 28, United States Code.

The Questions Presented

1. Is a plaintiff entitled to a trial by jury of a defense of the statute of limitations where that defense turned solely upon the question whether defendant could have been sued in California under the venue and jurisdiction provisions of Sections 4 and 12 of the Clayton Act?

2. Was a motion picture exhibition company subject to suit under the anti-trust laws in the district where the alleged conspiracy was carried out, where its wholly-owned subsidiaries operated many of the motion picture theatres which constituted its business, where one of its general managers resided and maintained his office and where its other general manager and its officers, agents and employees were actively engaged in supervising and directing the operations of its theatres and the affairs of its theatre-operating subsidiaries?

3. When an action is dismissed as barred by the statute of limitations, does that dismissal constitute a dismissal on the merits and a bar to a second suit in another jurisdiction?

The Statutes Involved

The pertinent statutes and rules are Sections 4 and 12 of the Clayton Act (38 Stat. 731 and 736, 15 U. S. C. §§ 15, 22); Section 351 of the California Code of Civil Procedure; Rule 41(b) of the Federal Rules of Civil Procedure; and 28 U. S. C. § 2072; the texts of which are set out in the appendix to this petition (*infra*, pp. 66-67a).

Statement

Plaintiff-respondent commenced this action against the petitioner under the anti-trust laws in the Eastern District of New York on September 5, 1951. Respondent alleged that by reason of the activities of the petitioner and many others not named as defendants it was injured in its property and business of operating the Tower theatre in Los Angeles, California. It alleged that it operated the Tower theatre until July 4, 1935, and it is conceded that its cause of action accrued in California no later than that date. This action was commenced against the petitioner over sixteen years later. Petitioner is the only defendant, although a number of other companies, against which the statute of limitations had then run, including petitioner's California subsidiaries, were named as co-conspirators.

It is conceded that the statutes of limitations barred the suit as to petitioner if it could have been sued in California during the three years after the cause of action accrued on July 4, 1935. Section 13 of the New York Civil Practice Act provides that a plaintiff's cause of action is barred in New York if it is barred by the statute of limitations of the state in which the cause of action arose, here California. To escape the bar

of the statute, respondent contended that the running of the three-year California statute of limitations was tolled (1) for the period from July 4, 1935, to July 20, 1938, under Section 351 of the California Code of Civil Procedure by petitioner's alleged absence from the state and (2) for the period subsequent to July 20, 1938, by the pendency of *United States* v. *Paramount Pictures Inc., et al.* (Equity Number 87-273, Southern District of New York) by virtue of Section 5 of the Clayton Act.

On the motion of respondent, a separate trial of petitioner's statute of limitations defense was ordered on June 25, 1954. District Judge Rayfiel ordered that the trial should be had before the court without a jury, since the issue involved related solely to a question of venue, that is, whether petitioner could have been sued in California under Sections 4 and 12 of the Clayton Act. Trial was held on December 12-16, 1955, before the Honorable Clarence G. Galston, United States District Judge. On March 28, 1956, Judge Galston rendered his decision in which he held that petitioner had been amenable to suit in California throughout the period from July 4, 1935, to July 20, 1938, and dismissed the complaint as barred by the California statute of limitations.* Coincident with the filing of his opinion, Judge Galston also filed extensive findings of fact and conclusions of law with respect to petitioner's business activities in both California and New York.

Judge Galston's findings—which all three judges of the court below held not to be clearly erroneous—were to the effect that petitioner during all of the periods of time involved was engaged in the business of exhibiting motion pictures in California through a large number of theatres located there which were owned or leased and operated by its direct and

*In view of the decision on this point, it was unnecessary for the District Court to consider the question whether the statute of limitations had been tolled by the *Paramount* case, *supra*, and that question is not involved in this proceeding.

indirect wholly-owned subsidiaries. He found that petitioner carried on substantial business activities in California, both directly and through its wholly-owned subsidiaries, had agents and officers there, including the residence and office there of one of its two general managers, and that petitioner maintained constant supervision over and intervention in the affairs and activities of its theatre interests and its theatre-operating subsidiaries. The evidence upon which such findings were based not only was not contradicted by respondent but the complaint affirmatively alleged that petitioner, both directly and through its subsidiaries, was present in California carrying on business there and performing in California acts in furtherance of the conspiracy which is the gravamen of respondent's complaint.

On the appeal the court below held that respondent was entitled to a trial by jury on the issue whether petitioner had been amenable to suit in California from July 4, 1935, to July 20, 1938, in a treble damage action under the venue provisions of the anti-trust laws. Accordingly, it reversed the judgment of dismissal and remanded the case to the District Court for a trial of that issue to a jury. The court below recognized that any factual issues present here were identical with those which are usually presented when a defendant moves to dismiss for improper venue and acknowledged that such issues are traditionally passed upon by the court alone during or prior to trial rather than by a jury. It nevertheless held that under the provisions of Rule 41(b) of the Federal Rules of Civil Procedure a dismissal of the complaint as barred by the statute of limitations constituted a dismissal on the merits. The court below thus converted what had theretofore been a procedural defense into a defense on the merits. On the rehearing, the Court of Appeals conceded that the District Court might have dismissed without prejudice but adhered to its view that, since the order of dismissal as barred by the statute of limitations did not so provide, respondent was entitled to a jury trial of that issue.

Reasons for Granting the Writ

1. Respondent Had No Constitutional or Statutory Right to a Trial by Jury of the Venue and Jurisdiction Issues Raised by Petitioner's Defense of the Statute of Limitations.

The decision by the court below that respondent was entitled to a jury trial of the venue and jurisdiction issues raised by petitioner's statute of limitations defense presents important and novel problems in the administration of the anti-trust laws. It is a decision of an important question of federal law which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The decision is in conflict with numerous decisions of this Court treating with questions of jurisdiction and venue. *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Wetmore* v. *Rymer*, 169 U. S. 115; *Gilbert* v. *David*, 235 U. S. 561; *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U. S. 266; and *Gibbs* v. *Buck*, 307 U. S. 66. It also runs counter to the rationale underlying decisions of this Court with respect to the jurisdiction and venue of the District Court in anti-trust cases. See *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359; *United States* v. *Scophony Corp.*, 333 U. S. 795; and *United States* v. *Nat. City Lines*, 334 U. S. 573.

Whether the California statute of limitations barred plaintiff's claim against petitioner turned upon one issue and only one issue, namely, could petitioner have been sued in California during the relevant periods under the Clayton Act.* The decision on the limitations defense followed from the decision on the venue issue. No magic attached to respondent's theory that it was entitled to a jury trial under the Seventh Amendment to the Constitution, or otherwise, merely because a resolu-

*The court below appears to have thought that the issue was whether petitioner was absent from the state. This, of course, is merely a different way of saying the same thing. If petitioner could have been sued in California, it follows that it was not absent from the state in the Clayton Act sense.

tion by the court of a jurisdictional issue resulted in the barring of respondent's claims in a particular jurisdiction.

This Court has held that these jurisdictional issues are to be determined by the court and that the parties are not entitled, as of right, to a jury trial. In *Gilbert* v. *David*, 235 U. S. 561, this Court said with respect to the adjudication of such issues (p. 563):

> "It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject."

The practice of having issues of fact relating to jurisdictional matters determined by the court was also approved in *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437. There the question before this Court was whether the defendant was doing business in Missouri for the purpose of suit in the Eastern District of Missouri. This Court stated that the Circuit Court "should have considered the question upon the *issues of fact raised*, as to the presence of the corporation in Missouri and the authority of the agent upon whom service had been attempted" (p. 445, emphasis ours).

In other cases this Court has noted that in the absence of statutory direction for procedure respecting issues of venue and jurisdiction, the mode of their determination is left to the trial court. *Gibbs* v. *Buck*, 307 U. S. 66, 71-72, and *Wetmore* v. *Rymer*, 169 U. S. 115, 121. And, of course, there is no statutory direction with respect to this matter in the Clayton Act.

There was no issue of fact raised at the trial in the District Court and decided by it that is not raised and decided daily by the judges of the District Court throughout the country in

deciding contested motions to dismiss for lack of jurisdiction and improper venue. As was said by Mr. Justice Frankfurter in his concurring opinion in *United States* v. *Scophony Corp.*, 333 U. S. 795, 819:

> "Whether a corporation 'transacts business' in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be 'found' anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges."

That the issue of jurisdiction and venue is for the court alone was decided in the first reported decision rendered under Section 12 of the Clayton Act. *Southern Photo Material Co.* v. *Eastman Kodak Co.*, 224 Fed. 523 (N. D. Ga., 1915). In that case the defendant entered a traverse to the return of service of the marshal, appeared specially for the purpose of challenging venue, and denied that it had ever had an office or place of business or any agent or agency in the State of Georgia. Plaintiff contended that it was entitled to a jury trial of the questions presented. In holding that the matter was for determination by the court alone, the court said (pp. 523-24):

> "The question presented now for determination is whether or not this question as to whether the defendant was properly served should be heard by the court or must be tried by a jury. * * *
>
> "Upon the general question of whether, in the federal courts, the court should hear and determine such question or submit it to a jury, the cases of Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39

> L. Ed. 517, Green v. Chicago, etc., Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and Mechanical Appliance Co. v. Castleman, supra, are, in my opinion, controlling. True, the question is not distinctly and directly raised in these cases; but in each of them an issue like this was heard by the court, without a jury, and nowhere was the question even raised that such action by the court was illegal or improper in any way. It seems to me to be the settled practice so far as I can understand it. * * *"

There were no decisions to the contrary in interpreting Sections 4 and 12 of the Clayton Act prior to the decision of the court below.

The majority of the court below accepted petitioner's contention that, with respect to the bar of the California statute, the decision "depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such suppositious suits." (248 F. (2d) 833, 835, Appendix, p. 4a).* The majority, however, then held that the "critical issue" was whether the statute bars the suits and that such "issue is not to be treated as merely one of venue" (Appendix, p. 4a). But can it be said that the tests of venue under Sections 4 and 12 of the Clayton Act differ with the exigencies of the case? Sections 4 and 12 of the Clayton Act—unchanged from the time of their enactment to the date this action was commenced—make no such distinction. There can be none.

The only question the District Court was called upon to try with respect to the bar of the California statute was whether petitioner could have been sued in California during the relevant three-year period. When the District Court held that venue

*Hereafter all references to the opinions of the court below are to the Appendix to this petition.

would have been proper, there was nothing open for decision. The bar of the statute followed as a matter of course. No separate factual or legal issue was presented. Thus, the statute of limitations defense, as such, in no way enlarged or altered the determinative issue whether petitioner could have been sued in California under Sections 4 and 12 of the Clayton Act.

What the District Court decided, therefore, was that the legal effect of petitioner's business activities in California constituted "transacting business" within the meaning of Section 12 of the Clayton Act and that it had an agent within that state within the meaning of Section 4. We think, in addition to all other considerations, that it would have been manifestly inappropriate to have allowed a jury to speculate upon such issues. What standards would the jury have applied in determining which activities of a corporation in a district constituted transacting business in contemplation of law? *Eastman Co.* v. *Southern Photo Co., supra, United States* v. *Scophony Corp., supra,* and *United States* v. *Nat. City Lines, supra,* make it abundantly clear that there is no hard and fast objective test to be applied. What constitutes transacting business and what relationship gives rise to the concept of agency within the meaning of the Clayton Act are questions that only the court properly can or should answer.

2. Even If Respondent Had Been Entitled to a Jury Trial Petitioner Was Entitled to a Directed Verdict on the Undisputed Facts Established in the District Court.

Apart from the question of respondent's right to a jury trial, the decision of the court below that petitioner's undisputed business activities in California did not, as a matter of law, constitute transacting business in that state so far departs from the recognized interpretations of Sections 4 and 12 of the Clayton Act as to call for an exercise of this Court's power of

supervision. It is petitioner's contention that no reversible error could have flowed from the denial of a jury trial because, on the record in the District Court and in line with controlling authorities, petitioner, in any event, would have been entitled to a directed verdict.

Such was the conclusion reached by Judge Learned Hand and noted in his dissenting opinion. He held that the decision below is directly contrary to the decision of this Court in *United States* v. *Scophony Corp., supra.* Basing his holding upon the evidence and the pertinent authorities, Judge Hand concluded (Appendix, p. 8a):

> "However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Rayfiel's error is immaterial. In short, I think that the defendant proved beyond dispute that it had been 'transacting business' in California throughout the critical period."

The foregoing statement is directly in line with the decisions of this Court holding that the venue provisions of Section 12 of the Clayton Act were intended to subject a corporate defendant to suit in a jurisdiction "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character" (*Eastman*, 273 U. S. 359, 373); that by the enactment of Section 12 the Congress intended to substitute "practical business conceptions for the previous hair-splitting legal technicalities" (*Scophony*, 333 U. S. 795, 808); that the basic aim of the Congress had been to give a plaintiff the right "to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries" (*Nat. City Lines*, 334 U. S. 573, 583); and that "a foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or

even without retreating to its headquarters defeat or delay the retribution due" (*Scophony*, 333 U. S. 795, 808).

Yet the decision below requires a reinstatement of the very "hair-splitting" technicalities consistently condemned by this Court. As was further said by Judge Hand in his dissenting opinion (Appendix, p. 12a):

> "In conclusion it seems to me worth while to observe that, although the result of my brothers' reasoning will indeed require the defendant to defend on the merits actions arising under the Anti-Trust Acts, toward which the Supreme Court, especially of late, has shown particular favor, it does so at the expense of a precedent of the greatest value to large corporations doing a wide interstate business. I cannot see why, if what we are deciding is right, a corporation by doing its local business through subsidiary corporations over whom it retains supervisory control, will not compel those whom it may damage to sue in some district where it can be 'found,' as distinct from any one in which it 'transacts business.' If so, the whole purpose of the amendment to § 12 will be defeated."

We submit that the correctness of Judge Hand's conclusion is inescapable when examined in the light of the indisputable facts disclosed by the record here. It was admitted and the District Court found that throughout the entire period of time here involved petitioner was engaged in the business of exhibiting motion pictures through theatres which were owned or operated by its direct and indirect wholly-owned subsidiaries. Approximately two hundred such theatres were located and operated in California (Finding 4, Appendix, pp. 36-37a).

It was undisputed that Charles P. Skouras was employed as one of petitioner's general managers pursuant to contracts dated January 19, 1932, and June 13, 1935; that in about March, 1932, Mr. Skouras established his office and residence in Los Angeles; and that he resided in California and performed

his duties from his office there as a general manager of petitioner from 1932 to 1942 and as president and general manager from 1942 until his death in 1954 (Findings 5, 7 and 9, Appendix, pp. 37-39a).

Charles P. Skouras was an officer and director of all of petitioner's subsidiaries in California. He was also active in all phases of petitioner's business throughout the country. The performance by him of his duties and functions as an officer and director of petitioner's subsidiaries in California was pursuant to and required by his contracts as a general manager of petitioner (Findings 7, 8 and 13a, Appendix, pp. 38a, 41a).

With respect to these activities of Mr. Skouras alone, the District Court held as a matter of law that Mr. Skouras was an agent of petitioner in California within the meaning of Section 4 of the Clayton Act (Conclusion of Law 8, Appendix, p. 61a). The court below did not challenge that basic finding. Yet the evidence on this point alone would have entitled petitioner to a directed verdict under Section 4 of the Clayton Act.

In addition, Spyros P. Skouras, petitioner's other general manager, was its president until November, 1934, and executive vice-president until April, 1942. He worked in close association with his brother and co-general manager Charles. (Findings 6 and 8, Appendix, pp. 37-38a). Spyros P. Skouras made from six to eight extended business trips to California each year from 1932 to 1942 to supervise, manage and carry on the business of petitioner and its subsidiaries in California. Mr. Skouras engaged in a variety of business activities in California, such as inspecting theatre properties, consulting with personnel employed by subsidiaries, buying film for theatres, and the like (Findings 13b and 13c, Appendix, pp. 41-42a).

It was undisputed that other individuals, employed directly by petitioner or its subsidiaries, performed substantial services for petitioner in California and carried on extensive business

activities for it in that state (Findings 13d, 13e and 13h, Appendix, pp. 42-44a). Furthermore, as expressly noted in Judge Hand's dissent, many direct activities relating to the operation of theatres in California were performed by a wholly-owned subsidiary "agency" corporation acting as agent for petitioner (Findings 13j, 13k and 13l, Appendix, pp. 45-46a). These and many other activities were found as facts by the District Court and were in no way contradicted by respondent.

We emphasize that as to all of these findings of the District Court, all three judges of the Court below hold that they were not "clearly erroneous".

Respondent's case rested almost entirely upon the offer in evidence of statements made by petitioner in connection with pleadings filed in unrelated judicial proceedings to which respondent not only was not a party but with respect to which it took no position to its detriment or otherwise. In these other proceedings, petitioner for tax purposes, raised the question whether it was doing business in California (Findings 24-27, Appendix, pp. 50-52a). Respondent asserted that these statements constituted a so-called "judicial estoppel"*, despite the fact that no one testified and there was no evidence that petitioner did not actually carry on the business activities which were found by the District Court.

In the face of the overwhelming evidence with respect to petitioner's business activities in California the court below nevertheless held that the pleadings and statements in other cases (although not an estoppel) constituted admissions which raised "genuine questions of fact which could not properly be taken from the jury" (Appendix, p. 5a). We submit that the court below erred in not recognizing that the uncontradicted and undisputed evidence with respect to petitioner's

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*In his dissent Judge Hand considers this argument concerning "judicial estoppel" and holds that it is "plainly without foundation" (Appendix, p. 8a).

actual business activities in California, regardless of statements in any other case*, required the direction of a verdict if the trial had been held before a jury.

Under the circumstances present here it is unrealistic to attempt to distinguish petitioner's activities from those of its wholly-owned subsidiaries.' It is contrary to the practical, everyday business concepts which this Court has consistently followed in the construction and application of Section 12 of the Clayton Act; it is, indeed, contrary to the clear intent of the Congress in enacting Section 12.

We submit, moreover, that petitioner here stood in the same position as Scophony, the English corporation, in *United States* v. *Scophony Corp., supra.* Petitioner conducted its principal business in California, that is, the management and supervision of the affairs of its subsidiaries there, in the only way it was capable of conducting them, namely, by having a resident general manager in California and by sending officers and agents there to supervise the subsidiaries' affairs. We submit that petitioner acquired no immunity to suit in California under the anti-trust laws by exhibiting motion pictures in theatres operated by its subsidiaries rather than directly. Under any practical, everyday business concept of transacting business, petitioner carried on substantial business activities in California and was amenable to suit there under the anti-trust laws. No issue of fact which could have been open for de-

*With respect to these so-called admissions in other cases, it should be noted that (1) in all such cases petitioner appeared, answered and defended, (2) no decision was ever rendered with respect to petitioner's amenability to suit in California and no gain accrued to petitioner as a result of such statements, (3) respondent was not a party or privy to any party to any such proceeding, (4) there was no evidence that respondent so much as knew of the cases to say nothing of having acted in reliance upon any such admission and (5) none of the statements constituting these so-called admissions was made in the sixteen-year period from October, 1932, to 1948 (Finding 25, Appendix, p. 50a).

termination by a jury could have changed this ultimate decision.

In addition to all the undisputed activities of the petitioner, the affirmative allegations of respondent's complaint itself charged that petitioner was actually present in California, both directly and through its wholly-owned and controlled subsidiaries, and that it committed the acts complained of in that state. Such allegations caused the District Court to grant judgment on the pleadings as well as to dismiss the complaints on the factual issues before it. The court below, however, also rejected that basis of decision. In so doing its decision is in direct conflict with two decisions of the Ninth Circuit. *Steiner* v. *20th Century-Fox Film Corporation*, 232 F. (2d) 190, and *Giusti* v. *Pyrotechnic Industries*, 156 F. (2d) 351, *cert. den.* 329 U. S. 787, and in likely conflict with the decision of the Third Circuit in *Paramount Pictures* v. *Rodney*, 186 F. (2d) 111, 113, *cert. den.* 340 U. S. 953.

3. A Dismissal on the Grounds of the Bar of the Statute of Limitations is not a Dismissal on the Merits under Rule 41(b).

The decision of the Court below that plaintiff was entitled to a jury trial rests squarely upon its holding that, under Rule 41(b) of the Federal Rules of Civil Procedure, a dismissal on the limitations defense constitutes a final adjudication on the merits and bars plaintiff's claim everywhere, unless the order of dismissal specifically provides that it is without prejudice. Thus, in its original opinion, the court said (Appendix, p. 4a):

> "But though decision as to whether these suits are barred by the statute depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such supposititious suits, the critical issue in the instant actions remains whether the statute bars the

> suits. That issue is not to be treated as merely one of venue. A determination of this defense has a reach and a finality not inhering in any decision as to venue. For if the defense of the statutory bar is sustained, the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy: a decision as to venue, however, of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F. R. C. P. 41(b)."

And on the re-hearing (Appendix, p. 16a):

> "We are unmoved by the petitioner's contention that we were wrong in asserting that a dismissal based upon a defense of the statute of limitations is an adjudication on the merits. Warner v. Buffalo Drydock Co., 2 Cir., 67 F. 2d 540, which is cited in support of that contention, we think is distinguishable. And moreover, it has been superseded by the clear mandate of Rule 41(b) of the Federal Rules of Civil Procedure which in its last sentence directly contradicts the holding of the *Warner* case. Although under the rule in a proper situation the District Judge may specify that his order be without prejudice, Judge Galston did not so qualify his order of dismissal."

Although, as the court below noted, the District Court might have provided for the dismissal of the action without prejudice, its asserted failure to do so becomes the basis upon which Judge Rayfiel is held to have committed error almost two years earlier when, on respondent's motion for a separate trial of the limitations issue, he ordered that the trial be to the court alone.

We submit that the construction of Rule 41(b) of the Federal Rules of Civil Procedure by the court below raises serious questions as to the validity of that Rule. It is a complete departure from prior precedent and is in conflict with decisions of other circuits. The issue is of importance in the administration of the Federal Rules and should be resolved by this Court.

The bar of the statute of limitations has traditionally been regarded as a purely procedural defense. Prior to the decision

of the court below, it was universally recognized that dismissal of a complaint as barred by limitations was not a dismissal on the merits which precluded a plaintiff from reinstituting his action in a forum in which it was not barred. *Bank of the United States* v. *Donnally*, 8 Pet. 361; *Brent* v. *The Bank of Washington*, 10 Pet. 596. See also 3 Freeman on Judgments, § 1397 (5th Ed.); Restatement, Judgments, § 49; 2 Beale, Conflict of Laws § 450.11.

Indeed, the leading modern federal case on the subject is the Second Circuit's own decision in *Warner* v. *Buffalo Drydock Co.*, 67 F. (2d) 540, *cert. den.* 291 U. S. 678. In that case plaintiffs brought an action in the Western District of New York to recover damages alleged to have been caused by the negligence of defendant's servants. Defendant denied negligence and pleaded as *res adjudicata* a decree in admiralty which had dismissed a libel previously filed by plaintiffs against the defendants in the Northern District of Ohio. The decree entered in the Ohio district court dismissed the libel on the ground that plaintiffs' action was barred by plaintiffs' laches in not instituting the libel within the two-year period allowed by the Ohio statute of limitations.

The trial court directed a verdict for the defendant on the ground that the earlier admiralty decree, although based upon the defense of the statute of limitations, was a judgment on the merits barring another action. In reversing the judgment below, the Court of Appeals (Judge Augustus N. Hand) said (p. 541):

> "A decision that the Ohio statute of limitations barred the remedy was not res judicata in an action to assert plaintiffs' rights in another forum. If the Ohio statute had extinguished the plaintiffs' rights, as in case of adverse possession of real property beyond the statutory period of limitation, the situation would be different. The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of a foreign state which dismisses a cause of action because

> of the statute of limitations of the forum is not a decision upon the merits and is not a bar to a new action upon the identical claim in the courts of another state. This is the settled doctrine of the English courts. Harris v. Quine, L. R. 4 Q. B. 652; Huber v. Steiner, 2 Bing, N. C. 202; Williams v. Jones, 13 East. 439. The same rule has been applied by the Supreme Court."

After discussing the decisions of this Court in *Bank of United States* v. *Donnally, supra,* and *Brent* v. *The Bank of Washington, supra,* and other cases, Judge Hand continued (p. 542):

> "The Ohio decree does not fail to bar the remedy in the present action because it is not res judicata as to everything which it decided, but because it did not decide that the plaintiffs' claim was extinguished, but only that they could not sue in Ohio on account of the local statute of limitations."

After noting that the foregoing was the law of New York and of England, Judge Hand concluded (p. 543):

> "All the foreign court adjudicates as a fact is that the action has been brought after the expiration of the statutory period, and, as a matter of law, that the remedy is barred in that court. To be sure, courts might hold that, where a suit is brought in one jurisdiction and fails, the same defendant shall not be vexed by another action. But no such doctrine obtains where the prior decision has merely barred a remedy less extensive than that affirmed by the lex fori. As no rule of law prevents the prosecution of both remedies concurrently, it is hard to see why failure of one should preclude the other where the periods of limitation are different. In our opinion, the dismissal of the libel by the Ohio court was not a bar to the present action."

The decision by the court below, overruling, in effect, *Warner* v. *Buffalo Drydock Co.*, is in conflict with decisions in at least the Third and Seventh Circuits which hold that a

dismissal on the limitations defense is not a dismissal on the merits which precludes a second suit in another jurisdiction where the statute had not run. *Bolten* v. *General Motors Corporation*, 180 F. (2d) 379 (7th Cir. 1950), *cert. den.* 340 U. S. 813, and *Hartmann* v. *Time*, 166 F. (2d) 127 (3rd Cir. 1948), *cert. den.* 334 U. S. 838. The same principle has been stated by the Tenth Circuit. See *Stokke et ux.* v. *Southern Pac. Co.*, 169 F. (2d) 42 (10th Cir. 1948). Each of these cases was decided after the effective date of Rule 41(b). Each involves the conclusion that that Rule did not affect the nature of a dismissal grounded on the statute of limitations.

In holding that dismissal of the complaint at bar "operates as a final adjudication of the merits of the controversy" (Appendix, p. 4a), the court below appears to have converted what had been a purely procedural defense barring suit in the particular forum into a substantive defense barring suit on the merits everywhere. If that interpretation of Rule 41(b) be correct, grave questions are presented as to the power of this Court to formulate such a Rule affecting substantive rights. Section 2072 of Title 28, United States Code, the statutory authority for formulation of the Federal Rules by this Court, specifically provides that the Rules "shall not abridge, enlarge or modify any substantive right." See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, and *United States* v. *Sherwood*, 312 U. S. 584. In the case at bar, the substantive right is respondent's heretofore unquestioned right to commence another action in another jurisdiction where the statute of limitations had not run, if any such jurisdiction were available.

We submit that the court below has engrafted an improper construction on Rule 41(b). The most that respondent is entitled to is an order of dismissal which explicitly recites that it is "without prejudice."* Cf. *Smith* v. *Ford Gum & Machine*

*We believe that the order of dismissal in the District Court already shows, upon its face, that it is based upon the limitations defense and thus is without prejudice. See order in Appendix, page 65a. If, however, there is any doubt on the matter, the proper procedure would seem to be to amend the order, not to order a new trial.

Co., 212 F. (2d) 581 (5th Cir. 1954). To grant respondent a new trial because of a claimed error in the form of the judgment would be an unreasonable and illogical elevation of form over substance.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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January 31, 1958.

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 329, 330—October Term, 1956.
(Argued May 9, 1957 Decided September 10, 1957.)
Docket Nos. 24253, 24254

BERTHA BUILDING CORPORATION,
Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

GUMBINER THEATRICAL ENTERPRISES, INC.,
Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

Before:

HAND, CHASE and HINCKS,
Circuit Judges.

Appeals from two judgments of the United States District Court for the Eastern District of New York, Clarence G. Galston, *Judge*, dismissing the plaintiffs' complaints in actions of treble damages for violation of the Sherman

Act, § 1-33 of Title 15, U. S. Code, on an opinion reported at 140 F. Supp. 909. *Reversed and remanded.*

BORIS KOSTELANETZ, New York, N. Y. (Corcoran, Kostelanetz & Gladstone, Arthur Karger, Theodore E. Gladstone, and Francis J. Mulderig, New York, N. Y., on the brief), *for appellants.*

FREDERICK W. R. PRIDE, New York, N. Y. (Dwight, Royall, Harris, Koegel & Caskey, Charles F. Young and Stanley Godofsky, New York, N. Y., on the brief), *for appellee.*

HINCKS, *Circuit Judge*:

These are appeals by the plaintiffs from judgments of Judge Galston, dismissing the complaints in two actions to recover treble damages under the Sherman Act. The only question presented is whether the actions were barred by the Statute of Limitations. In that connection, the crucial question is this: Was it proper for the judge instead of a jury to decide whether the defendant could have been sued in the Southern District of California between July 20, 1935 and July 20, 1938? This is critical because upon it depends the question whether the actions were barred by the Statute of Limitations when they were commenced in the Eastern District of New York on September 5, 1951; and why this is true appears from the following facts.

The Sherman Act, even after its amendment by the Clayton Act in 1914, deals with the Statute of Limitations only in § 5 of the second Act, which provides that the period during which a suit in equity, brought by the United States, shall be pending shall toll the running of the statute as

to "every private right of action * * * based * * * on matter complained of in said suit." Concededly such a suit was pending from July 20, 1938, until September 5, 1951, when these actions were begun. Except for this the law of New York controlled, and §48(2) of the Civil Practice Act of that state fixes six years as the period of limitation for an action "to recover upon a liability created by statute." Were this the only relevant section, the action of Gumbiner Co., in which the alleged damages were all suffered before Dec. 8, 1931, would have been barred in spite of §5 of the Clayton Act, but the action of the Bertha Building Corporation in which the damages did not end before July 4, 1935, would not have been. However, § 13 of the New York Civil Practice Act provides that when a claim "arises outside this state an action cannot be brought in this state to enforce" it "after the expiration of the time limited" by the law of the state where the claim arose, and since the claims at bar arose in California, the law of that state controls: *i.e.*, §351 of the California Code of Civil Procedure. This provides that, if the obligor of a liability is "out of the state" when it "accrues * * * the time of his absence is not part of the time limited for the commencement of the action." It is the defendant's position that it was not "out of the state" during the three years (the period of limitation in California), before July 20, 1938, because during all that time the plaintiffs could have sued it in the Southern District of California. If this was an issue properly tried to a judge, instead of to a jury, we all agree that Judge Galston's findings were not "clearly erroneous," so that at long last the outcome turns upon the answer to the crucial question posed in the opening paragraph of this opinion.

If the issue were one of whether the venue in each, or either, of the instant suits was proper, we should agree that no jury question was presented; for it is clear that a judge

may take that issue from a jury when it arises at a trial and decide it himself just as he might have done had it been raised before trial. But though decision as to whether these suits are barred by the statute depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such supposititious suits, the critical issue in the instant actions remains whether the statute bars the suits. That issue is not to be treated as merely one of venue. A determination of this defense has a reach and a finality not inhering in any decision as to venue. For if the defense of the statutory bar is sustained, the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy: a decision as to venue, however, of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F. R. C. P. 41(b).

Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and the need to weigh the evidence of National to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove. And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many occurrences which may seem to have chameleonic attributes when interpreted, or explained.

The burden is, of course, on National to establish its affirmative defense of the limitation statute. *Pieczonka* v. *Pullman Co.*, 2 Cir., 102 F. 2d 432. And when the plaintiff

has made out a prima facie case of absence from the jurisdiction the burden is on the defendant to show that such absence has not tolled the running of the statute. *Banister* v. *Solomon*, 2 Cir., 126 F. 2d 740.

Antitrust suits like these are triable as of right by jury if a party demands one. *Ring* v. *Spina*, 2 Cir., 166 F. 2d 546. And if National's affirmative defense based on the statute of limitations tendered genuine issues of fact, they were also as of right triable by jury. *Jelliffe* v. *Thaw*, 2 Cir., 67 F. 2d 880; *Chambliss* v. *Simmons*, 5 Cir., 165 Fed. 419. Applicable, to be sure, is the rule that when the evidence is so one-sided that reasonable men would not differ as to the facts proved, the judge may take the issue from the jury, but we do not regard the evidence in this record in that category even without the admissions of National. However that may be, its admissions that it did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury: that it was erroneous to refer such issues to Judge Galston for trial without a jury.

We would hold further that the dismissal below cannot be sustained as one properly ordered on the pleadings. This was an alternative ground on which the order appealed from was based.

Apparently Judge Galston thought that proof that National prior to 1938 was a member of a conspiracy which was injuring the plaintiffs within California (proof essential to a recovery) would necessarily mean that National was "transacting business" in California within the meaning of §12 of the Clayton Act and hence was entitled to prevail in its defense of the statute of limitations. In other words, he apparently thought that a fact essential to the proof of the claim also proved a defense to the claim. That analysis has indeed a superficial plausibility.

Admittedly, it is hard to see how a finding that National was not transacting business in California (without such a finding the plaintiffs cannot escape the defense of the statute) can square with a finding that National was part of of a conspiracy which caused injury to the plaintiffs in California (without which no recovery can be had on the complaint). However, the apparent conflict between those findings can perhaps be solved by ascertaining which of the numerous alleged co-conspirators are proven to be such, if any, and the relationship which exists between each of them and the defendant. Not until this is done, do the cases interpreting §12 of the Clayton Act [15 U. S. C. A. §22] become relevant. The most recent Supreme Court discussion of this problem occurs in dictum in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, where Justice Frankfurter dissenting on another point observes that co-conspirators "as such" are not "agents" for purposes of venue.

We cannot bring ourselves to accept the suggestion in *Giusti* v. *Pyrotechnic Industries*, 9 Cir., 156 F. 2d 351, that because of the presence within the jurisdiction of one co-conspirator all foreign corporations which are alleged to be co-conspirators are amenable to process. We think such doctrine inherently unsound and in conflict with the later pronouncement in *Bankers Life, supra.* The best discussion of the problem is in *Independent Productions Corporation* v. *Loew's Inc.* (S. D. N. Y. 1957), 148 F. Supp. 460. We agree fully with the rationale and holding of Judge McGohey's opinion in that case. Thus it is conceivable that the proofs may be such that a finding that National had no agents in California and acting independently had transacted no business there, and thus has not sustained its statutory defense, is not necessarily in conflict with a finding that it conspired with others to cause injury to the plaintiffs in California. The validity of a plaintiff's ver-

dict, if one shall be returned, cannot be assessed until all the evidence is in.

Reversed and remanded for a jury trial of the issue raised by the defendant's plea.

HAND, *Circuit Judge* (dissenting):

If these plaintiffs had sued the defendant within the period from July 20, 1935 and July 20, 1938, and the defendant had moved to dismiss the actions, as it did move on several other occasions, although the judge who heard the motion might have himself decided all issues of fact, he would have been free in his discretion to refer them to a jury, either upon a trial of that issue alone, or of the whole case. Rule 12(b) of the Federal Rules of Civil Procedure provides that among the defenses that a defendant may raise by motion is "improper venue," and Rule 43(c) provides that on any motion the court may hear the matter on affidavits, or "may direct that the matter be heard wholly or partly on oral testimony or depositions"; and there can be no doubt that this provision is constitutional. In a case depending upon the party's residence, the Supreme Court said: "* * * while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject." *Gilbert* v. *David*, 235 U. S. 561, 568. Earlier in *Wetmore* v. *Rymer*, 169 U. S. 115, 121, where jurisdiction depended upon the amount in controversey, it said: "* * * it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge." See also *Lehigh Valley Coal Co.* v. *Washko*, 231 Fed. 42, 46 (C. C. A. 2). However, although the judge in an action during the critical period would have been

free to dispense with a jury, I do not see how we can say that he would have done so, and, since the defendant has the burden of proof on the issue of the statute of limitations, it failed to prove that the issue whether the defendant was "transacting business" in California would have been tried to a judge. I agree, therefore, with my brothers that Judge Rayfiel's order was wrong. Hence it follows that, if on the evidence before Judge Galston, a jury in an action brought in California might have found that the defendant had not "transacted business" in that state, the plaintiffs at bar were entitled to a verdict.

However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Rayfiel's error is immaterial. In short, I think that the defendant proved beyond dispute that it had been "transacting business" in California throughout the critical period. It will be necessary as a preliminary to deal with the plaintiffs' agreement that, regardless of whether the defendant had in fact been "transacting business," its denials that it had been in at least ten actions brought against it in both state and federal courts constituted a "judicial estoppel" against its present contradictory position. It is of course true that upon the trial in the actions at bar any statements made by the defendant in its pleadings and affidavits in other actions were competent evidence in favor of the plaintiffs; but I can find no warrant for the theory that they created a "judicial estoppel," except suggestions in one or two law reviews. Moreover, since such a doctrine is plainly contrary to the underlying basis of the whole doctrine of estoppel by judgment it is plainly without foundation. Judgment by estoppel is not designed as a moral sanction against inconsistency: it does not visit penalties upon those who take one position today and deny it tomorrow; it is designed only to prevent a

party who has, or has not, prevailed upon an issue in an earlier action to vex the same antagonist with the same dispute in a later one. The plaintiffs cite *Houghton* v. *Thomas*, 220 App. Div. 415, to the contrary, but Mack, the party against whom the estoppel there prevailed, although not a party to the earlier action, had been the attorney of one of the parties, which the court held to be the equivalent—itself a very doubtful extension of the doctrine.

The only issue therefore is whether the evidence before Judge Galston was in enough conflict to entitle the plaintiffs to a trial by jury. That makes it necessary to decide what § 12 of the Anti-Trust Act means by "transacting business." Section 7 had allowed an action to be brought in any district in which the "defendant resides or is found" and in the case of corporations this became "often an insuperable obstacle to" any remedy. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 374. The Supreme Court there held that in § 12 Congress added the clause, "transacts business," in order to assist the enforcement of the act by ridding actions of the web of refined decisions that had been woven about the word "found." It made no attempt, however, to state in general terms what constituted "transacting business" beyond saying (p. 373), that a corporation did so in any district "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." However, the Court discussed the issue at length in *United States* v. *Scophony Corporation*, 333 U. S. 795, 807, 808. In that case the defendant, a foreign corporation, had, as here, "transacted business" by means of a subsidiary corporation whose conduct it reserved the right to supervise and regulate. It is true that the issue was whether that made the defendant "found" within the district where it was sued, but since the Court held that it did, *a fortiori*, it was a ruling that the defendant had been "transacting business" there. Therefore, it

seems to me that we can, and indeed must, take what was said as an authoritative gloss upon § 12. The Court declared that the statute meant the "practical everyday business or commercial concept of doing or carrying on business 'of any substantial character' "; and that the amendment had substituted "practical business conceptions" in place of "the previous hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence."

Judge Galston made very detailed findings that are too long and too many, to quote, but I append numbers 10, 11 and 12, because these succinctly state the facts that appear to me to be controlling. The plaintiffs object that these improperly imputed to the defendant such of the described activities as took place after the organization of a corporation, which the findings speak of as "Agency":—a wholly owned subsidiary whose officers were "in the main" the defendant's officers. I rely upon the following language in *United States* v. *Scophony Co., supra* (pp. 814, 815), which seems to me to make "Agency's" business "business transacted" by the defendant: "The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in American Scophony's affairs. We need not decide whether, in view of the agreements' continuing and persuasive effects, they could be considered as sufficing in themselves to make Scophony 'found' within the New York district. Whether so or not, they set the pattern for a regular and continuing program of patent exploitation requiring, as we have said, Scophony's constant supervision and intervention."

I cannot see why this language does not apply almost literally, *mutatis mutandis*, to the contract of December 2, 1935, between the defendant and "Agency" along with which

the defendant assigned to "Agency" the contract of Skouras Brothers of June 13. Of course it is true that a jury might not have believed the testimony offered by the defendant as as to what was done under these contracts, although they did not put in any evidence to contradict it. Moreover, there might be a difficulty, if there had been no evidence that "Agency" had ever acted under the contract. However, that the plaintiffs may not assert, for it would cut the ground from under the complaints, which are based upon acts of the defendant after the contracts had been made. Hence, if the jury disbelieved the testimony of the defendant's witnesses as to what they had done, they must assume that other persons committed the wrongs charged in the complaints, and yet that they did not do so in performance of the contract with "Agency," for that contract, if once in effect, set up a "program" of "constant supervision and intervention"; and made the defendant "transact business." Surely we are not warranted in treating seriously such a web of dialectical fantasy.

The only evidence that the plaintiffs produced was the defendant's repeated assertions that it did not do any business in California, and had no agents there. Although, as I have said, these were indeed admissible against it, they amounted to no more than statements of the legal result of whatever the defendant had done, and they raised no issue as to the authority vested in the Skouras Brothers by the contract of June 13, 1935, and in "Agency" thereafter. Any conduct in California in performance of those contracts *ipso facto* made the defendant "transact business" in that state, no matter how often the defendant chose to deny that that had been the legal effect of what was done. I need not therefore answer the argument that all parties to a conspiracy are not mutual agents in the sense that

what any one of them does is a "transaction of business" of all the rest.

In conclusion it seems to me worth while to observe that, although the result of my brothers' reasoning will indeed require the defendant to defend on the merits actions arising under the Anti-Trust Acts, toward which the Supreme Court, especially of late, has shown particular favor, it does so at the expense of a precedent of the greatest value to large corporations doing a wide interstate business. I cannot see why, if what we are deciding is right, a corporation by doing its local business through subsidiary corporations over whom it retains supervisory control, will not compel those whom it may damage to sue in some district where it can be "found," as distinct from any one in which it "transacts business." If so, the whole purpose of the amendment to § 12 will be defeated.

APPENDIX

"10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as 'Agency.' Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other accounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1933. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

> 'It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection * * *.'

Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was formed. After the organization of Agency, the fixed salaries were paid by that company pursuant to the assignment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National."

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 329-330—October Term, 1956.

(Petition filed Sept. 24, 1957 Decided November 7, 1957.)

Docket Nos. 24253-4

BERTHA BUILDING CORPORATION,

Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,

Defendant-Appellee.

GUMBINER THEATRICAL ENTERPRISES, INC.,

Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,

Defendant-Appellee.

Before:

HAND, CHASE and HINCKS,

Circuit Judges.

On Petition for Rehearing

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY, New York, N. Y. (John F. Caskey, Frederick W. R. Pride, Charles F. Young, Stanley Godofsky, of counsel), *for petitioner National Theatres Corporation.*

CORCORAN, KOSTELANETZ & GLADSTONE, New York, N. Y. (Boris Kostelanetz, Arthur Karger, Theodore E. Gladstone, Francis J. Mulderig, of counsel), *for plaintiffs.*

PER CURIAM:

By its petition for rehearing the defendant, National, persuades us to amplify and modify our original opinion and decision.

We are unmoved by the petitioner's contention that we were wrong in asserting that a dismissal based upon a defense of the statute of limitations is an adjudication on the merits. *Warner* v. *Buffalo Drydock Co.*, 2 Cir., 67 F. 2d 540, which is cited in support of that contention, we think is distinguishable. And moreover, it has been superseded by the clear mandate of Rule 41(b) of the Federal Rules of Civil Procedure which in its last sentence directly contradicts the holding of the *Warner* case. Although under the rule in a proper situation the District Judge may specify that his order be without prejudice, Judge Galston did not so qualify his order of dismissal.

We think, however, that National is right when it now urges that we failed to consider the impact of the New York statute of limitations on the Gumbiner cause of action. The Bertha cause of action arose in 1935 which was within six years of the *Paramount* action. Thus as to Bertha the six-year New York statute, C. P. A. § 48(2), could not possibly have run and the crucial question was whether the

three-year California statute had run, as we correctly stated in the opening paragraph of our original opinion. However, in the *Gumbiner* case there was another question equally crucial, viz., whether the New York statute of limitations had run. For the Gumbiner cause of action accrued on December 8, 1931. Thus if the New York statute was not tolled by National's absence, the Gumbiner action was barred here in December, 1937. Section 13 of the New York Civil Practice Act* is alternative in operation: if the statute has run either in California *or* in New York the suit is barred here.

Gumbiner argues that the New York law should determine whether in fact the statute has been tolled. From this premise it asserts that under state law, although National may have been amenable to process in New York, the statute was nevertheless tolled during that period. This argument derives from an analogy to an individual debtor who has hidden out in an obscure part of the state under an assumed name. If a creditor can find him, such a debtor is amenable to process: but while he is thus hiding the statute of limitations is tolled. Gumbiner thus concludes that even if National was amenable to process in New York, its presence was not open and notorious and on that account the statute was tolled during the relevant period.

Even if New York law does determine tolling (a proposition we need not decide in this case), this argument is fallacious. For the tolling statute (C. P. A. § 19)** during

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* Section 13 in pertinent part reads as follows:

"Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action * * *"

** The main paragraph of § 19 in its present form reads:

"If when the cause of action accrues against a person, he is without the state, the action may be commenced, within the

the relevant period had a subdivision (2), which declared "Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served." On the record in this case that section was applicable: National did have officers in the state. Gumbiner would read in a further requirement of open and notorious conduct. But all of the New York cases cited in support of this proposition are concerned with individual defendants, most of whom have just entered the state or have just returned to it. Not one case applies an "open and notorious" requirement to a foreign corporation otherwise amenable to process throughout the statutory period. Indeed, in *Mack* v. *Mendels*, 249 N. Y. 356, 164 N. E. 248, Judge Lehman admonishes the courts construing C. P. A. § 19 to read it as the Legislature wrote it and not to imply further requirements.

Gumbiner further urges that National was not amenable to process in New York under either federal or state standards. We disagree. A careful review of the evidence before Judge Galston on the question of whether the New York statute was tolled has convinced us that, if the facts had been heard by a jury, Judge Galston would have been required to set aside a plaintiff's verdict on this issue. Even though the jury might have disbelieved every one of defendant's witnesses, the documentary evidence recited in Judge

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time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action."

Galston's findings was overwhelming.* Regardless of which standard is applied it is irrefutable that National was amenable to process in New York during the relevant period. *United States* v. *Scophony Corp.*, 333 U. S. 795; *Pomerory* v. *Hocking Valley R. Co.*, 218 N. Y. 530, 113 N. E. 504; see also *Chaplin* v. *Selznick*, 293 N. Y. 529, 58 N. E. 2d 719.

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* The following findings of Judge Galston were based solely on a stipulation and on evidence corroborated by documentary evidence.

"32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i.e., from December 5, 1934, to January 3, 1936.

"33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y., in space rented from Twentieth Century-Fox. All officers of Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

"34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the payroll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

"37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

"38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $19,350,000 from the Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with the bank in order to borrow money.

We now hold, therefore, that the Gumbiner action, since the New York statute was not tolled by National's absence from New York or by its unpublicized activity in New York, is barred and that the District Court's dismissal of that action must be affirmed.

However, the majority of the court adheres to its holding that since the question of tolling in California presents substantial fact questions the *Bertha* case must be reversed and remanded for trial by jury on the limitations question.

As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

"39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's indebtedness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

"40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

"41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

"42. National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

"43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation." Prior to 1935 it had used the telephone facilities of Twentieth Century Fox without a listing and all calls came in through the Twentieth Century Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century Fox."

In addition, several contracts are in the record which list 444 W. 56 St., New York City, as National's office address and the address to which notices may be sent. In a "Consent of Guarantor" defendant is stated to have an office and place of business in New York City.

Petition granted and our previous decision is modified to provide

As to the Gumbiner case, affirmed;

As to the Bertha case, reversed and remanded.

Judge HAND again votes to affirm both judgments for the reasons stated in his earlier opinion and without passing on the opinion now rendered in the Gumbiner appeal.

UNITED STATES DISTRICT COURT

Eastern District of New York

Bertha Building Corporation, Plaintiff, *—against—* National Theatres Corporation, Defendant.	Civil Action No. 12073 March 28, 1956
Gumbiner Theatrical Enterprises, Inc., Plaintiff, *—against—* National Theatres Corporation, Defendant.	Civil Action No. 12074

Appearances

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GALSTON, D. J.

Pursuant to an order dated June 25, 1954 of Judge Rayfiel, a separate trial on the issue of the statute of limitations was conducted in two actions brought under the Clayton Act, 15 U. S. C. A., Section 1 et seq., against the defendant National Theatres Corporation. The actions were tried together. At the time of trial motions were made pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings.

The plaintiffs are California corporations, owning and operating theatres in the City of Los Angeles, California.

The complaints contain substantially identical allegations of conspiracy differing only in order of arrangement of the paragraphs and in the specific details of damage to the particular plaintiff.

It is important to note that in the very first paragraph of the complaint concerning jurisdiction it is alleged:

> "* * * the unlawful acts done in pursuance thereof, have been and were conceived, carried out, made effective and performed in part, within this District of the Court and elsewhere in New York and in Los Angeles, California, and throughout all parts of the United States."

Significant allegations are set forth as to the activities of operating subsidiaries of affiliates of the defendant in California. The defendant contends that the compelling inference must be that defendant, within the meaning of the Clayton Act, transacts business and is "found" within the State of California:

> "Wherever in this complaint it is alleged that any acts were done by any THEATRE OPERATING SUBSIDIARY of NATIONAL, plaintiff alleges that all of those acts were done at the behest and instigation of NATIONAL and were caused to be done by NATIONAL pursuant to the unlawful combination and conspiracy of which NA-

TIONAL was a member, all as will be more completely set forth below.

"Unless otherwise specified, reference to NATIONAL in this complaint is intended to include NATIONAL and any theatre operating subsidiary or affiliate thereof as the context requires. * * *"

"NATIONAL has, at all times mentioned in this complaint and since prior to 1930, controlled certain theatre operating companies which at all times mentioned in this complaint and since prior to 1930 have owned, controlled, leased or operated upwards of five hundred (500) theatres in the states of California, Missouri, Washington, Arizona, Kansas, Illinois, Oregon, Colorado, Utah, New Mexico, Wyoming, Idaho, Montana, Nebraska, Michigan and Wisconsin."

The plaintiffs define their own terms:

"10. *Conspirators.* The term 'Conspirators' whenever used in this complaint is intended to include, but is not necessarily limited to each and any or all of the following: * * * * * and in addition to them, the defendant NATIONAL THEATRES CORPORATION, hereinafter referred to as NATIONAL and the other defendants herein.

"11. *Theatre Operating Subsidiaries of the Conspirators.* The term, 'Theatre Operating Subsidiaries of the Conspirators' is intended to include and designate those subsidiaries and affiliates of each or any or all of the CONSPIRATORS hereinbefore designated which own, control, lease, or operate or have any interest in any motion picture theatre or theatres."

With respect to the conspiracy, each complaint alleges:

"Prior to January 1st, 1930, the defendant NATIONAL, and the other defendants herein and the MAJOR DISTRIBUTORS and certain producing and distributing corporations affiliated with or controlled by or controlling them, entered into an unlawful combination and con-

spiracy to restrain and to monopolize interstate trade and commerce in motion picture films throughout and in all parts and places of the United States. The members of this unlawful combination and conspiracy have hereinbefore been identified and designated as the CONSPIRATORS."

Trade practices were put into effect in California pursuant to the alleged conspiracy, which had as their object discrimination against so-called independent exhibitors, including the plaintiffs, to the advantage of the theatre-operating subsidiaries of the conspirators, including the theatre-operating subsidiaries of the defendant National in Los Angeles. Various means of effectuating the discrimination against the plaintiffs in Los Angeles are described, such as block booking, blind buying, uniform runs and clearances, fixing minimum admission prices and entering into joint theatre-operating agreements.

Overt acts of the conspirators in effectuating the conspiracy are charged:

> "In pursuance of said combination and conspiracy the said CONSPIRATORS, including as aforesaid the defendant herein NATIONAL, and affiliated corporations engaged in the practices and entered into the agreements and committed the acts herein alleged, all of which, unless otherwise stated, have been continuously and periodically done from the time of the formation of said conspiracy to July 20th, 1938, and subsequent thereto."

Certain practices are then described which are alleged to have been put into effect to favor the theatre-operating subsidiaries of National, and to discriminate against independent exhibitors, including plaintiffs in Los Angeles. For example:

> "During all times mentioned in this complaint and since prior to 1930, the CONSPIRATORS have excluded independent exhibitors, including the plaintiff, from the business of operating first and/or second run theatres and the business of exhibiting pictures on the

first and/or second run in the City of Los Angeles and in other cities of the United States with a population of over 100,000."

In Count Two of each complaint, it is alleged that there was a monopoly and conspiracy to monopolize the exhibition of motion pictures by National and its subsidiaries in certain areas, including specifically the State of California and particularly the City of Los Angeles. Means to effect the alleged monopoly are set forth:

> "2. NATIONAL and NATIONAL'S wholly owned subsidiary, Fox West Coast Theatres, Inc., a California corporation, with principal offices in Los Angeles, California, secured control of approximately Two Hundred and Sixty (260) theatres in the said states of California, Arizona, Nevada and New Mexico, which were organized and grouped into a circuit known as Fox West Coast Theatres, Inc.
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> * * * * * *
>
> "4. NATIONAL coerced, induced or persuaded or forced the operators of theatres in said states, including the plaintiff, to cease operating their theatres either so that NATIONAL or its THEATRE OPERATING SUBSIDIARIES could acquire such theatres or have removed the competition which such theatres in the hands of independent operators offered."

It is conceded that the Bertha cause of action accrued July 4, 1935, the Gumbiner December 8, 1931. It is from those dates that computations must be made as to the running of the statute of limitations.

Both actions were commenced in 1951, which is prior to the effective date of the four year federal statute of limitations (Section 4B of the Clayton Act, 69 Stat. 283, 15 U. S. C. A., Section 15B), and therefore the applicable statute of limitations is determined by reference to the law of the state in which the action is pending. *Chattanooga Foundry* v. *Atlanta*, 203

U. S. 390 (1906); *Hoskins Coal & Dry Dock Corp.* v. *Truax Traer Coal Co.*, 191 Fed. 2d 912 (7th Cir. 1951), cert. den'd 342 U. S. 947 (1952); *Schiffman Bros.* v. *Texas Co.*, 196 Fed. 2d 695 (7th Cir. 1952).

A federal court in applying the state statute of limitations applies the entire statute, including the statutory borrowing provisions relating to causes of action accruing in foreign jurisdictions. *Winkler-Koch Engineering Co.* v. *Universal Products Co.*, 79 Fed. Supp. 1013 (S. D. N. Y. 1947); *Hansen Packing Co.* v. *Swift & Co.*, 27 Fed. Supp. 364 (E. D. N. Y. 1939); *Seaboard Terminals Corporation* v. *Standard Oil Co.*, 24 Fed. Supp. 1018, aff'd 104 Fed. 2d 659 (2d Cir. 1939).

The New York statute, Article II of the Civil Practice Act (2d Ed. Cahill-Parsons 1955) contains a borrowing clause in Section 13:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of either this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply * *"

Thus, under Section 13, if a cause of action is barred in the state where it arose, it will also be barred in New York against a non-resident, regardless of whether the period of time allowed by the New York statute of limitations has or has not run. *Isenberg* v. *Ranier*, 145 App. Div. 256 (1st Dept. 1911); *Kirsch* v. *Lubin*, 131 Misc. 700 (Sp. Ct., N. Y. Co. 1927), aff'd 223 App. Div. 826 (1st Dept. 1928), aff'd 248 N. Y. 645 (1928); see Report of New York Law Revision Commission, N. Y. Legis. Doc. 1943, No. 65, pages 142, 164.

The applicable California statute of limitations is three years. California Code of Civil Procedure, Section 338-1.

In consequence, the causes of action alleged in the Bertha case were barred as of July 4, 1938, and the Gumbiner Theatrical case as of December 8, 1934, unless the statute was tolled. If it is established that the California statute was not tolled, then nothing more need be considered, since both limiting dates are prior to the institution of *United States* v. *Paramount et al.* (S. D. N. Y. Eq. No. 87-273). This action the plaintiffs claim tolled all statutes of limitation.

Basically though, the plaintiffs allege that the California Statute of Limitations was tolled by Section 351 of the California Code of Civil Procedure:

> "Sec. 351. EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Accordingly the California courts have construed that section in accordance with its stated purpose: to prevent the running of the statute of limitations against a plaintiff who was unable to present his cause of action in California because the defendant was not amenable to the process of the California courts. See *Chappell* v. *Thompson*, 21 Cal. App. 136, 131 Pac. 82 (D. C. App. 2d Dist. 1913); and *Schneider* v. *Schneider*, 82 Cal. App. (2d) 860, 187 P. 2d 459 (D. C. App. 2d Dist. 1947).

Therefore, the question presented is whether the defendant National Theatres was amenable to suit in California under the Anti-Trust Act. This question is in part solved by the Clayton Act, Section 12, 15 U. S. C. 22, which reads as follows:

> "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in

> the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found."

Thus to determine venue it must be decided whether within the meaning of Section 22 of the Act, National Theatres was an inhabitant of California, could have been found there, or transacted business there. The term "transacted business" in Section 22 has a particular meaning which is independent of other definitions of the term in state and federal courts. See *United States* v. *Scophony Corporation*, 333 U. S. 795 (1948).

California authorities support the position taken by the defendant. In *Steiner* v. *Twentieth Century-Fox Film Corporation et al.*, (Unreported, No. 12944-P. m. Civil, S. D. of California, Central Division, July 22, 1953) it was held that if

> "National Theatres engaged in the acts constituting the alleged conspiracy since 1935, all of which are alleged to have occurred in the State of California, then it was certainly doing business in the State of California sufficient to make it responsive to process of the courts of California, and this is true whether it was done directly by National Theatres Corporation or acting through its agents, the other members of the alleged conspiracy. Squarely in point is the Ninth Circuit case of Giusti v. Pyrotechnic Industries, 156 Fed. 2d 351, cert. denied 329 U. S. 787."*

In *E. B. DeGolia* v. *Twentieth Century-Fox Film Corporation et al.* (Unreported, Civil Action No. 32,514, September 9, 1953 and April 12, 1954, D. C. N. D. of Calif., Southern Division) the court reaffirmed the principle enunciated in the *Giusti* case (cited in the *Steiner* case *supra*) that venue is

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*Reversed and remanded on other grounds (9th Cir.) March 15, 1956.

proper as to all conspirators in the district in which the impact of the conspiracy caused the damage to the plaintiff. See also *Taylor* v. *Navigazione Libera Triestina*, 95 Fed. 2d 907.

Authorities in other states have held to the same effect. In *Ross-Bart Theatres* v. *Eagle Lion Films, Inc.* (Unreported, Civil Action No. 1576, Eastern District of Virginia, Norfolk Division, February 17, 1954) the plaintiff there moved to quash process in an anti-trust action and for dismissal of the action for improper venue. In denying the motion the court said:

> "The motion must be denied. Section 12 of the Clayton Act, 15 U. S. C. A. 22, said the Court in United States v. Scophony Corp. (1947) 333 U. S. 795, 808, intended that a 'foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating * * * to its headquarters defeat or delay the retribution due'. This conclusion was also the clear implication of Eastman Co. v. Southern Photo Co. (1925) 273 U. S. 359, 373. The result is that if the defendant was by itself or through others participating in any business combination or conspiracy in this district in 1948 in such a manner as to violate the anti-trust acts, it was suable here in 1953 no matter its then location. Further, for this purpose it could be reached with process running out of this Court wherever it was an inhabitant or was to be found. * * * the Court holds that the sworn charges of the combination and conspiracy in this district, and the commission of acts in the district pursuant thereto directly or by coconspirators admittedly present here, sustain venue in the eastern district of Virginia."

To the same effect is *Don George Inc.* v. *Paramount Pictures*, 111 Fed. Supp. 458 (W. D. La., 1951). In that case the court relied on the interpretation given Section 12 of the Clayton Act in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927). See also *Hansen Packing Co.* v. *Swift & Co.*, 27 Fed. Supp. 364.

In *United States* v. *National City Lines*, 334 U. S. 573 (1947) the court said, in discussing the changes enlarging the venue provisions under the original Sherman Act and the Clayton Act:

> "The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries." (p. 583)

So on the basis of the allegations in the complaints, Under Section 12 of the Clayton Act, 15 U. S. C. 22, the court sitting in California could have had jurisdiction over the defendant.

In these circumstances the decisions of the California courts compel the conclusion that Section 351 of the California Code is not applicable in the cases at bar, and the statute of limitations was therefore not tolled. The actions were therefore barred as of July 4, 1938 in the Bertha case, and as of December 8, 1934 in the Gumbiner case.

Defendant's motion for judgment on the pleadings under Rule 12c of the Federal Rules of Civil Procedure is granted and the complaints are dismissed.

Before proceeding to an alternative method of reaching the same result on the facts as adduced at the trial, the objections made by plaintiff to the inconsistent positions that have been taken by defendant in reference to doing business or transacting business in California may be considered. Plaintiffs urge that since defendant has previously taken the position, in other actions, that it was not doing business in California, defendant should now be precluded or estopped from changing its position.

Under the present rules of Federal Practice, inconsistent defenses are specifically permitted, Rule 8e (2). If this is allowed in the same action, it is difficult to sustain the position that defendant should not be allowed to plead in separate and distinct actions either one or both defenses.

Moreover the plaintiffs have not shown that in any of the actions in which such inconsistent plea was made it was sustained. In fact, evidence at the trial was to the effect that National, in each instance where the plaintiff did not seek dismissal, appeared and defended the action on the merits. This being so, the cases cited by plaintiffs are not in point. See *Philadelphia, W & B R. R.* v. *Howard*, 13 How. 307 (1851); *State Compensation Ins. Fund* v. *Proctor & Schwartz, Inc.*, 102 Fed. Supp. 451 (E. D. Pa. 1952); *Queenan* v. *Mays*, 90 Fed. 2d 525 (10th Cir. 1937), cert. den'd 302 U. S. 724; *Chandler Laboratories* v. *Smith*, 88 Fed. Supp. 583 (E. D. Pa. 1950).

Plaintiffs also rely on a note in 59 H. L. R. 1132 (1946), but at page 1136 the following point is established:

> "* * * * the courts do not usually preclude a party who has been inconsistent as to the law rather than as to facts. This result is probably reached on the reasoning that, historically, switching one's legal grounds in a suit has never been regarded with the same disfavor as maintaining inconsistent positions as to the facts. Clark-Code Pleading 1928 (p. 434)."

It cannot be too strongly emphasized that the facts are determinative of the issue whether the defendant was doing business or "found" during the times in question. Certainly there is no statutory act which precludes or estops the defendant from maintaining its present position. Nor indeed has the plaintiff been able to show that an equitable estoppel should be charged against the defendant. It may be observed in this connection that there is no showing by the plaintiffs that the plaintiff was prejudiced by the legal defenses which the defendant may have raised in other actions to which the plaintiffs were not parties. I repeat: the facts themselves are determinative of the issue.

The *Scophony* case (*supra*) makes it clear that "transacting business" must be interpreted in the light of the nature of the

activities of the corporation, and that a list of minor matters incident to doing business is not conclusive. Among such items which the court listed as not being valid criteria were: Maintaining an office, warehouse or place of business; owning realty or other physical property; keeping a staff of employees; keeping a telephone or listing, etc.

It was upon the absence of similar incidents of transacting business that plaintiffs here have heavily relied: lack of ownership of real estate, as lessee or tenant; non-payment of local taxes; not maintaining a staff of employees: location of record books, and not maintaining an office.

However, on the overall consideration of all the facts, including those relating to the nature of National Theatres Corporation as a holding company which took an active part in the affairs of its subsidiaries, it must be concluded that National transacted business in California during the period in question. and no less certainly could thus be "found" in California.

National was parent and grandparent in an intricate multicorporate structure, and through that structure engaged in the business of exhibiting motion pictures. Approximately two hundred theatres were located in California. Charles P. Skouras and Spyrous Skouras were general managers of National pursuant to contracts dated January 19, 1932 and June 13, 1935, and were present in California transacting business of the corporate structure and of direct interest to National. Charles Skouras actually established his office and resided in Los Angeles. National Theatres guaranteed performance by its subsidiary, National Agency Corporation, of the employment contract of J. J. Sullivan which was to be performed in California. John B. Bertero performed many specific services for National in California. National participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres. from February 1933 to February 1935 in the United States District Court for the Southern District of Cali

fornia; and National purchased, in California, the assets of the bankrupt estate at the trustee's sale in Los Angeles.

So as alternative grounds for dismissing the complaint as barred by the California statute of limitations, I find as a matter of fact that within the interpretation given Section 12 of the Clayton Act, 15 U. S. C. 22, in *United States* v. *Scophony Corp.*, 333 U. S. 795 (1947), and *Eastman Kodak* v. *Southern Photo Materials Company*, 273 U. S. 359 (1927), National Theatres was transacting business in California.

In the light of the foregoing analysis it is not necessary to this decision to pass upon the effect of the institution of the action of the *United States* v. *Paramount* on July 20, 1938. By that time the claims of both plaintiffs herein were barred by the statute of limitations in California. By no stretch of the imagination in such circumstances can it be held that the institution of the anti-trust suit filed by the United States against Paramount and other defendants, including National, can revive the dead issue, despite the provisions of 15 U. S. C. A., Section 16, which reads:

"* * *

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Nor is it necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years. It is sufficient for that purpose to refer to the findings which will be filed concurrently with this opinion. They are necessarily multiple because of the voluminous record.

It has been said truly that a statute of limitations is a statute of repose. See *Wood* v. *Carpenter*, 101 U. S. 135, in which it was said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecesar Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

Defendant was amenable to suits in both California and New York, and they should be precluded from maintaining actions sixteen and twenty years respectively after the alleged causes of action accrued. The complaints are dismissed.

Settle orders.

/s/ CLARENCE G. GALSTON
U. S. D. J.

UNITED STATE DISTRICT COURT

Eastern District of New York

Bertha Building Corporation, Plaintiff, —against— National Theatres Corporation, Defendant.	Civil Action No. 12073 March 28, 1956
Gumbiner Theatrical Enterprises, Inc., Plaintiff, —against— National Theatres Corporation, Defendant.	Civil Action No. 12074

In conformity with my opinion in these cases, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. The plaintiff in each action is a corporation organized and existing under the laws of the State of California.

2. The cause of action alleged by Gumbiner Theatrical Enterprises, Inc. against the defendant accrued on December 8, 1931, in California.

3. The cause of action alleged by Bertha Building Corporation accrued no later than July 4, 1935, in California.

4. Defendant National Theatres Corporation (hereinafter referred to as "National") is a Delaware corporation.

incorporated under the name of Wesco Corporation prior to 1930. During all of the periods of time here involved it was engaged in the business of exhibiting motion pictures through theatres which were owned or leased and operated by its direct and indirect wholly owned subsidiaries. During all of such periods certain of such wholly-owned subsidiaries operated approximately two hundred theatres in the State of California. National was a wholly-owned subsidiary of Twentieth Century Fox Film Corporation (then known as Fox Film Corporation) from prior to 1930 until November 14, 1934. On this latter date National was reorganized in New York and The Chase National Bank of the City of New York acquired 53 per cent of the stock of the company. In 1943, Twentieth Century-Fox reacquired the bank's interest and National again became a wholly owned subsidiary of Twentieth Century Fox.

5. On January 19, 1932, National entered into a written contract employing Spyros P. Skouras, Charles P. Skouras and George P. Skouras as general managers of its entire business and the business of its subsidiaries. Among other things, the contract provided:

> "(3) So far as permitted by law, the Managers shall have full authority to direct, manage and operate all of the business and affairs of Wesco * * and, in so far as Wesco during the term of this agreement controls the business and affairs of its subsidiary companies, to direct, manage and operate the business and affairs of such subsidiary companies."

Pursuant to this agreement two of the Skouras brothers, Spyros and Charles, entered upon their employment by National at or about the date of said agreement and, in fact, acted as the managers of the entire business of National throughout the country.

6. Pursuant to the agreement of January 19, 1932, Spyros P. Skouras was elected president and a director of National

which position he held until November, 1934, when Sidney R. Kent, president of Twentieth Century-Fox, was elected president of National. Spyros P. Skouras was elected executive vice-president at that time. His duties and the services performed by him, however, remained the same. Spyros P. Skouras continued as executive vice-president and one of the general managers of National until April, 1942, when he succeeded Mr. Kent as president of Twentieth Century-Fox. Thereafter he became Chairman of the Board of National.

7. Pursuant to the contract of January 19, 1932, Charles P. Skouras in about March, 1932, established his office as co-general manager of National at 1609 West Washington Boulevard, Los Angeles, California, such address being that of a building maintained by Fox West Coast Theatres, a wholly-owned subsidiary of National. Mr. Skouras also established his residence in Los Angeles. At or about that time he became an officer and director of all of National's West Coast subsidiaries, and continued as such during all of the periods here involved. In April, 1942, he was elected president and employed as general manager of National. He maintained his office and residence in Los Angeles continuously from March, 1932, until his death in 1954. The office maintained by him in Los Angeles was, in effect, the western office of National.

8. The two Skouras brothers, as general managers of National, were equal in the scope and extent of their authority. From in or about March, 1932, they were in day-to-day communication. Though Charles P. Skouras maintained his office and residence in California, his activities were not confined to the operation of National's affairs in that state; along with his brother and co-general manager, he was active in all phases of National's business throughout the country. He was also an officer and director of many of National's subsidiaries which operated in states other than California.

9. The contract of January 19, 1932, between National and the Skouras brothers was terminated on November 3, 1934. Negotiations for a new contract were then entered into which resulted in an employment contract dated June 13, 1935, whereby National again employed Spyros P. Skouras and Charles P. Skouras as general managers of its entire business for a period ending December 31, 1944. There was no interruption of the managerial and executive duties of the managers between November 3, 1934 and June 13, 1935, or of the services performed by them. Though the contract provided that National's rights to the services of the managers could be assigned to any service or operating subsidiary of National, the contract also provided that:

> "Notwithstanding any such assignment, the Corporation shall remain unconditionally liable as principal obligor for all obligations to be performed by it hereunder to the extent the same are not fully and finally performed by any such assignee, and the Corporation and the Managers shall retain all their rights hereunder, including without limitation any right to terminate this Agreement or enforce any of the provisions thereof for their own benefit, to the same extent as though no such assignment had taken place."

10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as "Agency". Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other accounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1935. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

> "It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection * * *."

Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was formed. After

the organization of Agency, the fixed salaries were paid by that company pursuant to the assignment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National.

13. Throughout the pertinent periods here involved National's business activities in California were substantial and continuous. Among such activities were the following:

(a) Charles P. Skouras continuously resided and maintained his office in California from 1932 until his death in 1954. From his office in California he carried out his duties and functions as one of the co-general managers of National until April, 1942, and thereafter as president and general manager. Charles P. Skouras was active in all phases of National's business activities throughout the country and carried out his functions as a manager of National's business as a matter of routine in his day to day activities. The performance of his duties and functions as an officer and director of National's subsidiaries in California were pursuant to and required by his contracts as a general manager of National. Such activities were performed mainly in California. Charles P. Skouras was an agent of National within the meaning of Section 4 of the Clayton Act.

(b) Spyros P. Skouras, the other co-general manager of National as well as president until November, 1934, and executive vice president until April, 1942, made frequent and extended business trips to California, from six to eight each year, from 1932 to 1942 to supervise, manage, and carry on National's business in the Far West and particularly in California in conjunction with his brother and co-general manager

Charles P. Skouras. When not in California, Spyros P. Skouras was in almost daily communication with Charles P. Skouras with respect to the affairs of National, not only in California but throughout the country.

(c) When in California, Spyros P. Skouras consulted and advised not only with Charles P. Skouras but with others who carried on National's business there. He visited and inspected theatre properties; carried on negotiations for the licensing of motion pictures; and held conferences with personnel employed directly by subsidiaries but who assisted in carrying on the business of National in California. He was accompanied from time to time by other officers of the company who also performed services for National in California. Film buyers usually accompanied Spyros P. Skouras on his trips to California and performed film buying activities there.

(d) J. J. Sullivan was the chief film buyer for National's West Coast subsidiaries. His film buying activities were under the supervision of Spyros P. Skouras. His activities in this respect were for theatres operated by subsidiaries of National in California and elsewhere. Mr. Sullivan at all times was a resident of California and maintained his office at 1609 W. Washington Boulevard in Los Angeles, but spent from four to six months each year in New York in the performance of his work. He signed an employment contract with Agency on December 5, 1935, and National guaranteed performance of the contract. Mr. Sullivan had refused to enter into the contract unless National guaranteed payment. The contract provided that notices should be sent to Mr. Sullivan at 1609 West Washington Boulevard, Los Angeles, California. The contract provided that expenses incurred by Mr. Sullivan outside of Los Angeles were to be reimbursed by Agency. If performance of the contract required Mr. Sullivan to spend more than six months of the year outside of Los Angeles, he had the right to terminate.

(e) John B. Bertero, a member of the California Bar, was employed by one of National's subsidiaries in October, 1930, and has continuously been employed in Los Angeles by one of such subsidiaries since that time. Continuously during all periods here involved he has resided in Los Angeles and has maintained his office at 1609 West Washington Boulevard in that city. Mr. Bertero and other attorneys directly employed by National's subsidiaries performed continuous services for National as a matter of routine, as well as when called upon to do so by one of the managers or officers of the company. Part of his function was to cooperate or work with Charles P. Skouras, National's manager. He continuously advised with Mr. Skouras in Los Angeles concerning various problems of National. Among the specific services performed by Mr. Bertero were work for National in Los Angeles in connection with bank loans made to National and its subsidiaries by The Chase National Bank in 1932; work with National's representatives in connection with the bankruptcy of Fox West Coast Theatres and of Pacific Northwest Theatres in 1933-1935; inspection of theatre properties in Montana and Wyoming when National considered realigning its theatre operating divisions about 1937; appearance for Fox West Coast Theatres Corporation and work with National's attorneys in the case of *Tally & Corbar* v. *Fox Film Corporation et al.* in the United States District Court in Los Angeles in 1935-1936; selecting and advising with attorneys who represented National in litigation in California; and, throughout the entire period, the day to day activities incident to his employment which involved or related directly to the business of National.

(f) National appeared and actively participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres, from February, 1933, to February, 1935, in the United States District Court for the Southern District of California in Los Angeles. National was one of the largest

creditors of the bankrupt, and because of the size and importance of its claims had a crew of men and representatives on the ground in California. Spyros P. Skouras and H. C. Cox, officers of National, were active in the proceedings in California. National purchased the assets of the bankrupt at the trustees' sale in Los Angeles on February 2, 1935. Funds for use in purchasing the assets were made available at the Security First National Bank of Los Angeles.

(g) In the action entitled *Tally & Corbar Corporation* v. *Fox Film Corporation et al.*, brought in the United States District Court in Los Angeles in 1935, National was named as a defendant together with Fox Film Corporation, one of its parents, and a number of its subsidiaries. The object of the suit was to set aside the Fox West Coast Theatres bankruptcy proceedings. National appeared in and defended the action. National was represented by attorneys from Los Angeles and San Francisco.

(h) National maintained its insurance department in Los Angeles continuously from 1930 to the time of the institution of these actions. The head of that department was Irving Epsteen, a resident, since at least 1930, of Los Angeles. Mr. Epsteen's office was at all times maintained at 1609 West Washington Boulevard in Los Angeles. Mr. Epsteen was on the payroll of Fox West Coast Service Corporation until 1935, of Fox West Coast Agency Corporation until 1942, and thereafter of Agency, all of which companies were direct or indirect wholly owned subsidiaries of National. During the entire period Mr. Epsteen has placed all the insurance on the properties of National and its subsidiaries, as well as all liability insurance. All negotiations for insurance took place in Los Angeles, California. The contract of December 2, 1935, between Agency and Fox West Coast Agency Corporation contained the following provision with respect to insurance:

> "(b) We (Agency) will advise you as to the placing and renewal of fire, liability and other insurance

for your Local, Serviced and Local Holding Companies and, if requested by you, will, to the extent authorized by such Companies, contract for such insurance either by individual policies on separate properties (or risks) or by blanket policies covering all or any part of the properties (or risks) of any one or more of the Operating Companies, Holding Companies or others."

(i) In the period between 1935 and 1939 National retained and paid attorneys in California who represented National and its subsidiaries or National's subsidiaries and the trustees in bankruptcy of Fox West Coast Theatres.

(j) National 's agent, Agency, carried on extensive business activities for National and its subsidiaries in California from December, 1935, to the date these actions were filed. Such activities and services were supervisory, advisory and managerial, and were of the nature Agency had agreed to perform in its contracts of December 2, 1935, with National and with Fox West Coast Agency Corporation. In general they represented services and activities which, prior to 1935, had been performed directly by National, its officers and agents.

(k) In a contract dated December 2, 1935, between Agency and Fox West Coast Agency Corporation, Agency agreed to perform substantial services for Fox West Coast Agency Corporation and the other subsidiaries of National with which it had contracts. Included among such services for theatres in California and elsewhere were the buying and booking of motion picture films, advice with respect to and the placing of insurance, advice with respect to advertising and advertising policies, contract for repairs and the furnishing of supplies and equipment when requested and to render such special services as might be needed. The contract authorized Agency to enter into contracts for and on behalf of Fox West Coast Agency and the California subsidiaries serviced by it. Agency also agreed to furnish legal and auditing services to Fox West Coast Agency Corporation and the companies

serviced by it. National unconditionally guaranteed the payment by Fox West Coast Agency Corporation of its obligations to Agency under this contract.

(l) In the contracts between Fox West Coast Agency Corporation and the theatre operating subsidiaries of Fox West Coast Theatres Corporation it was provided that not only should services be rendered by Fox West Coast Agency Corporation but also by Agency. The contracts specifically provided that the services of Fox West Coast Agency should also include the services of Agency.

(m) While the separate corporate entities of National's subsidiaries were maintained, National, as sole stockholder, participated in the control and operations of its subsidiaries in California during all the periods of time here involved. Its general managers were officers of the more important subsidiaries. National arranged for and participated in the subsidiaries' financing. Its officers and agents engaged in business transactions for such subsidiaries. Such transactions involved contracts directly relating to the operation of theatres in California and elsewhere.

(n) The complaints herein affirmatively allege that National controlled and dominated its subsidiaries. The subsidiaries are alleged to have acted at the behest and instigation of National and the acts alleged to have been done by National are alleged to include those done by its subsidiaries.

14. When these actions were commenced in this court on September 5, 1951, the president and sole stockholder of each of the plaintiff corporations was one H. L. Gumbiner of Los Angeles, California. He verified the complaints in each of these actions, in which vertification he declared that the allegations contained in the complaints were true. In said complaints it is alleged that the plaintiffs here, during all pertinent periods of time, were the owners and operators of the Los Angeles and Tower Theatres in Los Angeles.

15. On February 2, 1935, in the United States District Court for the Southern District of California, Central Division, H. L. Gumbiner commenced an action under the anti-trust laws of the United States against Fox Film Corporation (one of the parents of the defendant National), Fox West Coast Theatres Corporation and other subsidiaries of the defendant National, the bankrupt estate of National's subsidiary Fox West Coast Theatres and the trustees in bankruptcy of that company, one of National's general managers, Charles P. Skouras, and others.

15-A. In that case H. L. Gumbiner verified the complaint, wherein he was plaintiff, and alleged that he was the operator of the Tower and Los Angeles Theatres in Los Angeles, California, and that he owned the causes of action sued upon. The Tower and Los Angeles theatres in Los Angeles, California, are the same theatres that the plaintiffs herein alleged that they owned and operated. The causes of action herein asserted are essentially the same as those which H. L. Gumbiner individually asserted in 1935.

16. Though National was not specifically named as a defendant in that action, one of its parents, several of its subsidiaries and its co-general manager, Charles P. Skouras, were named as well as several "John Doe" defendants. Skouras was a defendant both individually and as a trustee in bankruptcy of National's wholly-owned subsidiary Fox West Coast Theatres.

16-A. In the complaint filed by Gumbiner it was alleged that Charles P. Skouras had "an office and place of business" in Los Angeles and that he was "the general manager of all of the businesses" of operating the theatres which are referred to in the complaint. Such businesses included the "business" and theatres in California in which National was interested and as to which National had contracted with Skouras to act as general manager.

17. National's Board of Directors directed that Alfred Wright, a Los Angeles lawyer, be retained to represent National's subsidiaries. Skouras individually, and the trustees in bankruptcy (whom National had agreed to indemnify against any such claims). Mr. Wright, under the retainer by National, appeared for and represented National's subsidiaries, the trustees in bankruptcy and Charles P. Skouras individually. Through this retention and representation National was in control of the litigation.

18. In addition to the sworn allegations in his complaint that H. L. Gumbiner was the owner and operator of the two theatres involved, and the owner of the causes of action now asserted by the plaintiffs here, Gumbiner held himself out to be the owner and operator of the Tower and Los Angeles theatres. Exhibits introduced at the trial show that H. L. Gumbiner advertised in the Los Angeles Times that the Los Angeles theatre was individually owned and independently operated by him. The Defendants in that case had cause to believe and were justified in believing that H. L. Gumbiner operated the Los Angeles and Tower Theatres and that the causes of action asserted with respect to such theatres were owned by him.

19. On the day that H. L. Gumbiner brought his individual action, namely, February 2, 1935, National was present in the same United States District Court in Los Angeles by its officers and attorneys and on that date purchased the assets of the bankrupt estate of Fox West Coast Theatres from the trustees in bankruptcy.

20. The action brought by H. L. Gumbiner, individually, was compromised and settled. A general release was executed by him and a stipulation of dismissal with prejudice was executed by him and his attorneys on June 3, 1935, and an order of dismissal was entered thereon. As part of the settlement a subsidiary of National leased the Tower Theatre

for ten years, effective in July, 1935, at a substantial yearly rental.

20-A. On June 3, 1935, the date when H. L. Gumbiner and his attorneys executed the stipulation of dismissal of the action brought by him individually, H. L. Gumbiner owned all of the stock of the present plaintiff, Gumbiner Theatrical Enterprises, and also owned all of the stock of the present plaintiff, Bertha Building Corporation. On that date H. L. Gumbiner was also the president of both of the present plaintiff corporations.

21. The institution of the present actions by H. L. Gumbiner's wholly-owned corporations, in which he verified each of the complaints is inconsistent with the action brought by H. L. Gumbiner in his own name in 1935, in which he also verified the complaint and asserted that he owned the causes of action sued upon. The representations made by him at that time were relied upon by National to its prejudice. Further, as to the lease which was entered into by a subsidiary of National, there was no evidence that any action was ever taken by H. L. Gumbiner or the plaintiff in this case, Bertha Building Corporation, to set aside the lease, nor was there any evidence that any action has ever been taken to set aside the release which he gave or the stipulation and order of dismissal with prejudice which he signed. The two plaintiffs here and H. L. Gumbiner, by their actions and failure to act, caused National to rely to its prejudice upon the validity and binding effect of the lease, the release and dismissal with prejudice of the claims asserted by H. L. Gumbiner.

22. The plaintiffs herein, the wholly-owned corporations of H. L. Gumbiner, were in privity with H. L. Gumbiner with respect to the causes of action asserted by him, and are bound by H. L. Gumbiner's acts and representations.

23. There was no evidence that at the time of the settlement of the action brought by H. L. Gumbiner in 1935, at

which time he was the sole stockholder of both plaintiffs here, any reservation was made by him or by either of such corporations of any claim or cause of action against National or any of its subsidiaries.

24. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in an action filed in the Superior Court of the State of California in and for the County of Los Angeles on September 26, 1932, entitled *Jensen & von Herberg* v. *Wesco Corporation*. National, under its then name of Wesco Corporation, was named as a defendant in that case. It appears from those papers that on October 8, 1932, National made a motion to dismiss the complaint for improper venue and lack of jurisdiction. No decision with respect to that motion was ever rendered. Plaintiff voluntarily withdrew the action and subsequently refiled it, first in Delaware, and then in the Supreme Court of the State of New York, New York County, on January 4, 1934. There was no evidence that either plaintiff in these cases relied upon any position taken by National in the California proceedings. There was no evidence that plaintiffs ever knew of or were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Jensen & von Herberg* case.

25. In the period between October, 1932, and 1948 there is no evidence that National ever claimed or asserted in any judicial proceeding or otherwise that it was not subject to suit in California, (except as described in finding 24). To the contrary, during that period, National appeared and actively participated in the bankruptcy procedings of Fox West Coast Theatres in 1933-1935. It appeared and defended in the *Tally & Corbar* case in Los Angeles in 1935. It retained counsel and was in charge of the defense in the action instituted by Gumbiner in 1935.

26. Plaintiffs were also permitted to introduce in evidence certain pleadings in cases filed in California during the period from 1948 to 1951 in which National was named as a defendant. In each and all of those thirteen cases National appeared by counsel and filed its answer. In its answers National pleaded as a separate defense that venue and jurisdiction were improper as to it because, in effect, it was not doing business in California. It was established by the evidence and the court finds that such defenses were pleaded in National's answers because of tax considerations. National did not wish to have on record a judicial admission that it was doing business in California which could be interpreted as an admission that its business there was of such nature as to subject it to California franchise taxes. Its subsidiaries were qualified to do business in California and paid taxes on the business done by them in California, and National maintained that its separate activities there did not constitute such business as to make it liable for additional taxes. No practical anti-trust or financial consequences attached to the assertion of these defenses by National. For in all of these thirteen cases either its parent corporation, Twentieth Century-Fox Film Corporation, or one or more of its most important subsidiaries, or both, were defendants.

27. In none of the thirteen cases was any decision ever rendered with respect to the defense set forth in the answers filed by National. In each instance, National, prior to taking any steps to litigate the issue raised by these defenses, determined to and did abandon the defenses. It was advised that in the opinion of its counsel, such a defense could not be sustained. Neither of the plaintiffs now before this court was a party to any of these thirteen cases. There was no evidence that either plaintiff at any time knew about or in any way relied upon any pleading or representation by National in those cases or that it was in any way deterred from filing

a complaint against National in California. No element of estoppel in favor of either plaintiff was created by the answers filed in any of the thirteen cases referred to above.

In view of other findings herein contained, the activities of National in California were such that the Statute of Limitations had run against the plaintiffs in California long before the pleadings in these thirteen actions were filed in 1948 and subsequent thereto.

28. The continuous and substantial business activities of National and its agents in California throughout the periods involved here, and particularly during the period between 1932 to July 20, 1938 (the date when the case of *United States* v. *Paramount* was filed), were such as to subject it to the jurisdiction and venue of the United States District Court in California under the venue provisions of the anti-trust laws during all of such periods. The presence and continuous business activities of National's wholly-owned subsidiaries in California, the presence and continuous activities of Charles P. Skouras as co-general manager of National, the frequent and extended business visits to California of Spyros P. Skouras, National's other co-general manager and President or Executive Vice President, and the business conducted by him there, the visits of other officers and film buyers to California to conduct business for National there, National's participation in the bankruptcy proceedings of its principal subsidiary, Fox West Coast Theatres, from 1933 to 1935, its retention of California counsel to represent its subsidiaries, the trustees in bankruptcy of Fox West Coast Theatres and Charles P. Skouras individually and its control over and activities in the litigation brought by H. L. Gumbiner in February, 1935, National's appearance in and defense of the case entitled *Tally & Corbar Corporation* v. *Fox Film Corporation, et al.*, in the California courts from 1935 to 1937, the retention and payment of attorneys for services in various cases in California, the location of its insurance department in California, the

business carried on in California for National by J. J. Sullivan, the performance of day to day and special services for National by John B. Bertero and others in California, and the substantial activities of Agency in California constituted the transaction of business there by National to the extent that it could have been sued in California for three years after the accrual of both causes of action asserted here and prior to the institution of the Paramount case. The claims of both plaintiffs herein are, therefore, barred by the California statute of limitations.

29. National itself had not qualified to do business in California; paid no taxes to the State of California; owned no real estate in California; had no telephone or other office listing in California; had no employees in California, other than Charles P. Skouras, on its own payroll; paid no rent for any office space used by its officers and agents, and was the lessee of no real estate in California except that it was the guarantor of the lease to the Fox Theatre in San Diego, the sum total and nature of its other activities and those of its agents in California were such that had it been sued in California under the anti-trust laws at any time during the periods involved here, it could not have succeeded in establishing that venue in California was improper or that it was not subject to the jurisdiction of the Federal Courts in California.

30. Spyros P. Skouras as President and a co-general manager of National from February, 1932 to November, 1934, and as Executive Vice-President and a co-general manager from 1934 to April, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. His office was also maintained at that address from 1942-1952, during which time he was Chairman of the Board of Directors of National. During all of these periods Mr. Skouras was also a director of National, and resided in New York.

31. Sidney R. Kent, President of National from November 14, 1934 to March, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. During that period Mr. Kent resided in New York and was also a director of National. Other officers and directors of National continuously maintained their offices and residences in New York.

32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i.e., from December 5, 1934, to January 3, 1936.

33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y. in space rented from Twentieth Century-Fox. All officers of Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the payroll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

35. In the period between 1932 and 1942 one of Spyros P. Skouras' principal duties was acting as the head of National's film buying department in New York. He and his

assistants regularly negotiated for and entered into film licensing agreements with motion picture distributing companies in New York. Such contracts were entered into for the five or six hundred theatres operated by National's operating and agency subsidiaries. Mr. Skouras negotiated and executed such contracts as agent of the subsidiaries.

36. From 1930 throughout the period here involved, National retained and paid attorneys at law to represent it generally and specially in New York. Its general counsel was a New York firm.

37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $19,350,000 from the Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with the bank in order to borrow money. As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent. of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's indebted-

ness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

42 National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century-Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation". Prior to 1935 it had used the telephone facilities of Twentieth Century-Fox without a listing and all calls came in through the Twentieth Century-Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century-Fox.

44. National maintained an office at 26 Journal Square, Jersey City, New Jersey, from January 1, 1935, to June, 1936. At that office were located, for a year and a half, its bookkeeping and accounting department, consisting of seven or eight people, and two officers. Duri g that period the chief operating executives of the company maintained their offices in New York. The opening of the office in New Jersey came

about because of tax considerations. Neither Mr. Skouras nor Mr. Kent ever had an office in New Jersey. The personnel of the New Jersey office were required to come to New York to advise and consult with Mr. Skouras and Mr. Kent.

45. The Jersey City office, at which was located National's accounting and bookkeeping departments, was closed in June, 1936. Meetings of National's Board of Directors were held for a brief time at that office but after December, 1936, Board meetings in New Jersey were held in the office of the manager of the State Theatre in Jersey City. National had no employees located in Jersey City after June, 1936. Soon after Twentieth Century-Fox re-acquired the Chase National Bank's interest in National and again became the sole stockholder, corporate meetings were again held in New York.

46. The business activities of National in New York throughout the period from 1930 to the date these actions were filed were substantial and continuous. Even during the period when it maintained an office in New Jersey, its main office must be held to have been in New York where its President, Executive Vice-President and other officers were located and where they carried out their functions and duties as officers of the company. The fact that this Jersey City office was sometimes referred to as National's "principal office" or "principal place of business" does not alter the actual facts as to the existence of its office and that of its executives in New York. Throughout the period that the Jersey City office was maintained, National's Board of Directors and Executive Committee met in New York. After June, 1936, National's only activities in New Jersey were the holding of meetings of its Board of Directors in Jersey City until January, 1944.

47. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in *Hillside Amusement Company* v. *Warner Bros. Pictures Inc., et al.*, an action filed in the United States District Court for the Southern District of

New York in February, 1941. National was named as a defendant in that action. It appears from those papers that in March, 1941, National made a motion to dismiss (in the form of an order to show cause) for improper venue and lack of jurisdiction. It was established by the evidence and the court finds that such motion was filed because of tax considerations. No decision with respect to that motion was ever rendered. Upon advise of counsel that venue in New York was proper as to it and that it could not successfully contest the jurisdiction, National withdrew the motion and entered a general appearance. An order was entered dismissing the motion and noting that National had filed a general appearance. National subsequently answered and defended the action.

48. Neither of the plaintiffs in these cases was a party to the *Hillside* case. There was no evidence that any position taken or pleading filed by National in that case was known to or relied upon by either plaintiff in these cases. There was no evidence that plaintiffs were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Hillside* case. Furthermore, in view of the findings herein made, the activities of National in New York were such that the Statute of Limitations of New York had run against the plaintiff Gumbiner Theatrical Enterprises prior to the filing by National of any papers in the *Hillside* case.

49. There was no evidence that prior to the filing of its motion in the *Hillside* case in 1941, National had ever filed any pleadings or had made any statements or had taken any position to the effect that it was not subject to the jurisdiction of the courts of New York or that it was not amenable to suit in New York. To the contrary, in 1934, in an action entitled *Palmer* v. *Wesco Corporation*, it had been sued in New York

in the Supreme Court, New York County, appeared in the action, defended and eventually settled the case.

50. The court finds that the continuous and substantial business activities of National in New York throughout the periods here involved constituted the transaction of business by National in New York and subjected it to the jurisdiction and venue of the United States District Court in New York within the meaning of the anti-trust laws. With particular reference to the period from 1930 to July 20, 1938, the date when the *Paramount* case was filed, a period of more than six years after the accrual of the cause of action asserted by Gumbiner Theatrical Enterprises, National transacted business in New York and had agents there within the meaning of the venue provisions of the anti-trust laws. The court finds that the presence, continuous activities and maintenance of offices in New York by National's chief executives, Spyros P. Skouras and Sidney R. Kent, and also by Mr. Skouras as a co-general manager of National; the presence, activities and maintenance of offices in New York by other officers of National; the meetings of National's Board of Directors and Executive Committee in New York; the retention of attorneys to represent it generally and specially; the maintenance of bank accounts; the substantial loan transactions effected by National and its guarantees of loans to its subsidiaries; the entering into of various contracts in New York; the film buying activities by National on behalf of its subsidiaries; the receipt and payment of dividends in New York; the presence of its parent corporations in New York; and the substantial and continuous business activities of its agent, Agency, in New York constituted transacting business by National during that particular six-year period prior to the institution of the *Paramount* case. The court finds that National could have been sued in New York during that period and that the claim of the plaintiff Cumbiner Theatrical Enterprises is barred by the New York Statute of Limitations. The Court further finds

that National's activities in New York were such that it could have been sued in New York, under the anti-trust laws, continuously throughout the period here involved.

CONCLUSIONS OF LAW.

1. The Statute of Limitations of California, where the alleged causes of action arose, is three years. California Code of Civil Procedure, Section 338-1.

2. Plaintiffs and defendant concede for the purposes of these cases, and the court concludes that the Statute of Limitations of New York, where these actions were instituted, is six years. Civil Practice Act of the State of New York, Section 48.

3. By virtue of Section 13 of the Civil Practice Act of the State of New York, the Statute of Limitations of the State of California, where the alleged causes arose, is applicable if defendant could have been sued in that state.

4. If the defendant was amenable to suit in California during the pertinent periods involved here, the California statute applies. If the causes of action are barred in California, they are barred in New York by Section 13 of the Civil Practice Act.

5. The cause of action alleged in the *Gumbiner Theatrical* case accrued in California on December 8, 1931. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the *Paramount* case. If National could have been sued in New York in an anti-trust case for any period of six years prior to July 20, 1938, the action would also be barred by the New York Statute of

Limitations, regardless of whether barred in California, and regardless of any tolling effect of the *Paramount* case.

6. The cause of action alleged in the *Bertha Building* case accrued in California on July 4, 1935. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the *Paramount* case.

7. Spyros P. Skouras was an agent of National in New York during the period from 1932-1942, within the meaning of Section 4 of the Clayton Act.

8. Charles P. Skouras was an agent of National in California during all of the periods of time here involved, within the meaning of Section 4 of the Clayton Act.

9. National Agency Corporation was an agent of National in New York after its organization in 1935, within the meaning of Section 4 of the Clayton Act.

10. Throughout all the periods of time here involved, National had one or more officers in New York upon whom service of process could have been made within the meaning of Section 19 of the Civil Practice Act of the State of New York. Section 19 did not operate to toll the New York Statute of Limitations. Defendant, moreover, was amenable to suit in New York under the venue sections of the anti-trust laws, which are the controlling venue statutes involved here.

11. The pleadings and affidavits filed by National in other cases to which plaintiffs were not parties, and which on their face were inconsistent with defendant's position here, are not conclusive upon defendant but were open to explanation and rebuttal.

12. No element of estoppel operated in these cases in favor of plaintiffs to preclude defendant from offering evi-

dence with respect to its business activities in California and New York.

13. National, within the meaning of the venue provisions of the anti-trust laws, transacted business and had agents in California for three years after the causes of action in both cases arose and could have been sued there. Both causes of action were, therefore, barred by the California three year Statute of Limitations prior to July 20, 1938.

14. The complaints must, therefore, be dismissed.

/s/ CLARENCE G. GALSTON
U. S. D. J.

UNITED STATES DISTRICT COURT

Eastern District of New York

Gumbiner Theatrical Enterprises, Inc. *vs.* National Theaters Corporation	Civ. 12074
Bertha Building Corporation *vs.* National Theaters Corporation	Civ. 12073

Appearances:
Corcoran & Kostelanetz, Attorneys for Plaintiff
By Boris Kostelanetz, Esq., for the Motion
Dwight, Royall, Harris, Koegel & Caskey,
Attorneys for National Theaters Corp. By
Frederick W. R. Pride, in opposition.

Rayfiel, J.

SUPPLEMENTAL MEMORANDUM

In my decision dated June 10, 1954, in the above-entitled action, believing that there was no opposition thereto, I granted plaintiff's motion for a separate trial to the Court and a jury of the issues raised by the defense of Statute of Limitation. I have since examined the applicable portion of the transcript of counsels' argument of the motion before the Court and

learned that the consent of defendant's counsel was limited to a separate trial of such issues to the Court alone.

The defense of the Statute of Limitations is legal in its nature and involves issues which in my opinion the plaintiff is not entitled to have tried to the Court and jury under the 7th Amendment to the Constitution of the United States.

Accordingly my aforementioned decision is modified to that extent and I shall sign an order consistent therewith.

Dated: June 25, 1954

/s/ LEO F. RAYFIEL
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BERTHA BUILDING CORPORATION, *Plaintiff,* —*against*— NATIONAL THEATRES CORPORATION, *Defendant.*	Civil Action No. 12073

ORDER

This Court on June 25, 1954, by an order of Judge Rayfiel, having ordered a separate trial of this case on the issue of defendant's defenses that the action was barred by the statutes of limitations of the State of California and of the State of New York, and the case having been tried on that issue on December 12, 13, 14, 15 and 16, 1955, and this Court, on March 28, 1956, having rendered and filed its opinion, findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED that the complaint herein be and the same hereby is dismissed with costs to defendant in the amount of $468.13, and the Clerk of this Court is hereby directed to enter judgment hereon.

/s/ CLARENCE G. GALSTON
United States District Judge

Brooklyn, New York.
April 16th, 1956.

PERTINENT STATUTES AND RULES

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22, reads:

> "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Section 351 of the California Code of Civil Procedure reads:

> "EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

The pertinent provision of Rule 41 (b) of the Federal Rules of Civil Procedure reads:

> "(b) *Involuntary Dismissal: Effect Thereof.* * * * Unless the court in its order for dismissal otherwise

specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

The pertinent provisions of Section 2072 of Title 28, United States Code, reads:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 761

NATIONAL THEATRES CORPORATION, *Petitioner,*

v.

BERTHA BUILDING CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Of Counsel:

NICK C. SPANOS,
EUGENE GRESSMAN,
FRANCIS J. MULDERIG.

April 4, 1958.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent Bertha Building Corporation opposes the grant of the petition for a writ of certiorari in this case since the judgment below is clearly correct, presents no novel or important question of federal law, and involves no conflict of decision.

QUESTION PRESENTED

The only relevant question presented is whether the respondent was entitled to a jury trial in a federal

court on contested issues of material fact relating to petitioner's affirmative defense of the statute of limitations.

STATEMENT OF THE CASE

The proceedings below were confined to a separate trial of the issues raised by petitioner's affirmative defense that respondent's complaint under the anti-trust laws was barred by the California statute of limitations. That trial was held by Judge Galston alone despite respondent's repeated requests for a jury trial as to the contested issues of material fact arising out of that plea.

The sole question to be determined at the trial was whether the petitioner had met its burden of establishing that the cause of action was barred by the California three-year limitations statute. To meet that burden, it was incumbent upon petitioner to prove that it had been present openly, notoriously and continuously in California throughout the entire three-year period after the cause of action accrued. Sec. 351, Cal. Code of Civil Proc.

During the course of the trial, conducted without a jury, respondent introduced various pleadings and portions of sworn testimony which petitioner had offered and which had been admitted in prior judicial proceedings in California. These pleadings and testimony were to the effect that petitioner had not been present in California in that it had never done business and had never had an office or agent in that state and hence had never been subject to the jurisdiction of courts sitting in California.

Thus on at least thirteen different occasions, in lawsuits brought against it in California, petitioner for-

mally challenged the jurisdiction of courts in that state and denied that it was present in California or that it had been doing business there. R. 17a-48a, Res. Exs. 3, 7-17, 26. Typical of the many statements to this effect was the affidavit dated September 26, 1932, by L. A. Woolams, the then vice-president of petitioner. Res. Ex. 3. In that affidavit, filed in the case of *Jensen* v. *Wesco Corp.*, in the Superior Court of the State of California, Woolams stated under oath that petitioner did not have "any employee or employees or managing agent or any other person located in the State of California," that no employee, agent or representative "transacted or engaged in or did any business in the State of California for or on behalf of said corporation," and that petitioner "was not engaged and is not now engaged in doing any business of any sort or nature in said state." To the same effect was petitioner's answer filed twenty years later, in 1952, in response to an anti-trust action brought against it in a federal court in California (*Levy* v. *Paramount Pictures, et al.*, Res. Ex. 10). Petitioner there alleged:

> "To and including the time of filing this answer said defendant has not had, and does not have, an office in the State of California nor has it engaged in or conducted, nor does it conduct or engage in, any business in the State of California, it has never qualified to do business in the State of California and it has never consented to be sued in the State of California, or resided, or been found, or been present or had any agent in the State of California."

Petitioner now contends (petition, p. 14) that these statements were merely made "for tax purposes"; in other words, that its allegations and sworn testimony were nothing more than parts of a scheme to avoid the

payment of state franchise and other local taxes in California, R. 215a, which scheme was successful in that petitioner concededly paid no taxes to California for a period of at least twenty years, R. 150a.

The factual dispute over petitioner's presence in California was further highlighted at the trial by admissions from one of petitioner's own witnesses that petitioner had no office in California and had no listed telephone during the relevant period after 1930. R. 205a. He further admitted that the petitioner had been an entity separate and distinct in its business from that of its subsidiaries and affiliates. R. 224a-225a. And a federal marshal, attempting to serve a summons in May 1947 upon the petitioner, was forced to certify on the return that after "diligent search" he had been unable to find petitioner "within my said District," the Southern District of California (which was the only California district in which the petitioner, even in its about-face in this case, seriously claimed to have been present). R. 214a, Res. Ex. 24.

The District Court at the trial, however, permitted the petitioner to import concepts of venue under the federal anti-trust laws as part of its proof that it was present in California within the meaning of Section 351 of the California Code of Civil Procedure, containing the tolling provision of that state's statute of limitations. On the basis of these concepts, the court held in effect that the California statutory element of "presence in the state" was established as a matter of law by evidence that it would have been theoretically possible for a hypothetical judge in California to have found that venue under the Clayton Act would have been proper as to petitioner in California from July 4, 1935, to July 20, 1938.

The trial court thus interpreted the California limitations statute in complete disregard of the pertinent state law. It read that statute as if the *only* requirement for avoiding the effect of the tolling provisions was for the petition to establish that venue under the federal anti-trust laws could have been properly laid as to petitioner in California. Upon such reasoning, the District Court held that the limitations plea should be sustained and the complaint dismissed.

The Court of Appeals reversed the action of the District Court. It held that the only question presented was whether the action was barred by the California statute of limitations, a question which was not to be treated as merely one of venue. As to that question, the respondent was held entitled to a trial by jury since the limitations defense tendered genuine issues of fact. In the words of the Court of Appeals:

> "Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and the need to weigh the evidence of National to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove. And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many occurrences which may seem to have chameleonic attributes when interpreted, or explained. * * *
>
> ". . . However that may be, its admissions that it did no business in California and had no agents

> there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury; that it was erroneous to refer such issues to Judge Galston for trial without a jury."

In its opinion on rehearing, the Court of Appeals reiterated that "the crucial question was whether the three-year California statute had run, as we correctly stated in the opening paragraph of our original opinion" and that "since the question of tolling in California presents substantial fact questions the Bertha case must be reversed and remanded for trial by jury on the limitations question."

ARGUMENT

Petitioner seeks to deny respondent its constitutional right to a jury trial on contested factual issues arising out of a limitations plea by so masking and so camouflaging the limitations issue as to make it appear to be nothing more than an issue of venue and jurisdiction. Indeed, the petition herein, on analysis, is nothing more than an attempt to distort the single, basic issue involving the tolling provisions of the California limitations statute into another and completely different issue of venue and jurisdiction under Sections 4 and 12 of the Clayton Act.

The petition throughout ignores the vital consideration that the defense of limitations turns not on an application of federal venue statutes but on the application of the statutes of the State of California suspending the running of the statute of limitations in favor of any defendant while such defendant is "out of the state"; and that under the controlling requirements of the state law of California, it is incumbent

upon a defendant foreign corporation in the position of this petitioner to make a showing of certain elements, separate and distinct from venue, in order to avoid the effect of the provisions of the California state law suspending the running of the California statute of limitations.

I. The Court of Appeals correctly applied the well-settled rule that a jury trial is a matter of right as to contested factual issues involved in a limitations plea.

The decision below was to the effect that petitioner's defense based upon the California statute of limitations is triable as of right by a jury since genuine issues of material fact concerning petitioner's activities in California are in dispute. In so holding, the court below was merely applying the long-settled rule that questions of material fact raised by the defense of the statute of limitations are triable as of right by a jury rather than by a court alone. *Michigan Insurance Bank* v. *Eldred*, 130 U.S. 693, 699 (1889); *Jelliffe* v. *Thaw*, 67 F. 2d 880, 882 (C.A. 2, 1933); *Stornelli* v. *U.S. Gypsum Co.*, 134 F. 2d 461 (C.A. 2, 1943); *Don George, Inc.* v. *Paramount Pictures*, 111 F. Supp. 458, 471 (W.D., La., 1951). That decision is so obviously correct and devoid of conflict with other decisions as to warrant denial of the petition for a writ of certiorari.

The applicability of this well-established rule to this case is at once clear. The basic problem at stake was whether the cause of action was barred by the California three-year limitations statute. The determination of that problem required the resolution of a number of disputed questions of fact. Among the questions of fact involved were the nature and extent of petitioner's activities, if any, in California during the relevant period. Had the petitioner been doing

business in California continuously during the three-year period? Had its presence there, or that of its officers, been open and notorious, or secret and clandestine? The answers to these questions depended in large part upon the credibility of witnesses who testified in these respects. Much also depended upon the significance and credence to be given to the solemn and deliberate representations made by petitioner in various court proceedings over many years that it had never transacted or carried on business or been found in California during the relevant period. There was thus a large task for the fact finder or arbiter of disputed facts. There was, in short, a need for a jury.

As the Court of Appeals stated (248 F.2d at 836), petitioner's admissions in the prior judicial proceedings that it "did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury; that it was erroneous to refer such issues to Judge Galston for trial without a jury." The controversial nature of those admissions, warranting a jury trial, cannot be doubted.

Nor do any of the factual considerations advanced in the petition for certiorari (pp. 12-14) free this case from the category of those warranting a jury trial upon demand. The facts with respect to the activities in California of petitioner's subsidiaries and of petitioner's general managers were all the subject of dispute and doubt. And the fact that the District Court made findings in those respects which were not labeled clearly erroneous by the Court of Appeals does not negate the highly controversial nature of the findings or the underlying facts. The

findings of the District Court simply reflected the trial judge's view as to the preponderance of the disputed evidence; there was no indication that the findings rested on uncontroverted evidence.

The very existence of controversy as to the facts and the need for weighing the credibility of witnesses and documents in this case demonstrate conclusively that the Court of Appeals properly held that the elements justifying a jury trial were present. This case, in other words, involves no more than an application of a well-settled principle as to jury trial to the particular facts of this proceeding. As such, the case presents no novel or important principle warranting review by this Court.

2. The Court of Appeals correctly held that the application of the California limitations statute is not to be treated as merely a problem of venue.

In urging that respondent was not entitled to a trial by jury, petitioner advances the claim that the issue to be determined was merely one of venue. Thus, in the first of its "Questions Presented" (petition, page 2), petitioner inserts the false postulate that the defense of limitations turns "solely upon the question of whether defendant could have been sued in California under the venue and jurisdiction provisions of Sections 4 and 12 of the Clayton Act". This erroneous premise is restated and repeated over and over again by distortions and misstatements in the balance of petition,[1] as, for instance, on page 6, where it is said:

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[1] For instance, it is inaccurate for petitioner to claim (petition, pp. 5, 16) that respondent's complaint affirmatively alleged that petitioner was present in California in view of the fact that Paragraph XII of that complaint contains the following in subpara-

"Whether the California statute of limitations barred plaintiff's claim against petitioner turned upon one issue and only one issue, namely, could petitioner have been sued in California during the relevant periods under the Clayton Act. The decision on the limitations defense followed from the decision on the venue issue."

That statement and the others to like effect throughout the petition are, of course, simply not true.

The pertinent California decisions establish that even if it were proper to import the federal venue concept of "transacting business" into the California statute of limitations to show petitioner's "presence" in California, that would in any event not suffice of itself to enable petitioner to avoid the effect of the California provisions suspending the running of the California statute of limitations.

California requires that in order to avoid the effect of its statute suspending the running of the period of limitations, the party pleading the defense of limitations has the burden of proving each and all of the following three elements:

(1) that the defendant was present in the state;

(2) that his presence was continuous for the statutory period required; and

(3) that his presence was open and notorious, not secret and clandestine.

---

graph 3: "Since this cause of action accrued, the defendants were out of the State of California and up to the time of the filing of this complaint have never transacted any business or had any office or agent in the State of California and were not to be found there and have never designated any agent for the service of process upon them in the State of California and have never been subject to the service of process in that state."

It is not enough merely to prove the single element that the defendant was "present" and that his "presence" was continuous for the statutory period. California requires further proof that defendant's presence in the state for the required period was "(3) open and notorious, not secret and clandestine."

Thus in *Lawrence* v. *Ballou*, 50 Cal. 259 (1875), the California Supreme Court, at page 264, listed as the conditions under which a foreign corporation, such as petitioner, would be considered "within the state within the intent of the statute of limitations," so as to be able to "claim the benefits of the statute": (1) that the foreign corporation have a "managing agent in this state;" who was (2) "exercising openly his authority as such and without fraudulent concealment;" and (3) had "exercised his functions here continuously for the period fixed by the statute of limitations." See also *Palmer* v. *Shaw*, 16 Cal. 93 (1860); *Stewart* v. *Stewart*, 152 Cal. 162, 92 Pac. 87 (1907).

It is obvious from the foregoing that there is no necessary correlation between venue under the Clayton Act and tolling the California limitations statute. Considerations of fairness and convenience in subjecting a defendant to trial in a particular forum (factors irrelevant to an application of the state limitations statute), would be paramount in resolving the issue of venue. Conversely, questions as to open and notorious presence in the state and open and notorious exercise of authority in the state by agents acting as such without fraudulent concealment, which are crucial on the issue of the tolling of the California limitations statute, are not decisive in determining venue and jurisdiction under

the Clayton Act. Thus jurisdiction and venue under the Clayton Act might well have been proper in California as to petitioner on any particular day a complaint might have been filed during the relevant three-year period. But unless it could be proved that petitioner's officers or agents were present continuously in California throughout the entire three-year period, and in an open and notorious fashion, the California limitations statute would not have been tolled and would not bar the action. In other words, federal anti-trust concepts of venue and jurisdiction relate at best only to the first of the three critical elements necessary to avoid the tolling provisions of the California limitations statute, the element of presence within the state.

Nothing in this Court's decision in *United States* v. *Scophony Corp.*, 333 U.S. 795 (1948), or in the other decisions cited by petitioner, justifies any importation of the venue concepts under the Clayton Act into the interpretation and application of a state statute of limitations. Nor is there anything in those decisions providing any excuse for denying to respondent its basic and constitutional right to a jury trial as to disputed factual issues arising out of the limitations plea. Indeed, the *Scophony* decision was intended to prevent corporations from escaping liability for their anti-trust wrongs by raising technical objections to venue. It would seem a tragic perversion of that decision if the petitioner were now permitted to use it to accomplish the very escape from liability which this Court intended to block.

2. The statements of the Court of Appeals regarding Rule 41(b) raise no reviewable issue in any way related to the right to a jury trial on contested factual matters.

Petitioner seeks further a review of the statement below that if petitioner's limitations plea had been sustained "the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy," whereas a decision as to venue "of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F.R.C.P. 41(b)." Petitioner's claim, in other words, is that a judgment of dismissal sustaining a limitations plea is not an adjudication on the merits and that "the most [sic] respondent is entitled to is an order of dismissal" (p. 20 of petition) without prejudice so that it might bring an action in some other jurisdiction where limitations had not run.[2]

The short answer is that, since the court below held that the judgment of dismissal was improperly entered and that respondent was entitled to a jury trial on the limitations issue, the effect of a judgment of dismissal is presently immaterial. Additionally, petitioner is in no position to question the propriety of such an order on the ground that it might have been too prejudicial to respondent. Respondent alone could make such an attack, but only after such an order had become final. Only then would a question as to the impact of a final order of dismissal be ripe for consideration by this Court.

---

[2] It has been conceded that actually there is no longer available to respondent any other jurisdiction where limitations does not bar the action. Thus, regardless of Rule 41(b), Judge Galston's erroneous ruling would have had for all practical purposes the same effect as an adjudication on the merits.

In any event, the question as to the effect of Rule 41(b) on an order of dismissal in these circumstances is in no way determinative of respondent's right to a trial by jury on contested factual matters. The remarks of the Court of Appeals relative to Rule 41(b) were at most dicta and were unnecessary to its decision.

Moreover, the decision as to the effect of such an order was clearly correct. Under Rule 41(b) a dismissal "other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." Since the dismissal here was based upon the limitations plea and was not one "for lack of jurisdiction or for improper venue," it is obvious that the dismissal would operate "as an adjudication upon the merits." See *American National Bank & Trust Co.* v. *United States*, 142 F. 2d 571 (App. D. C., 1944). Only if the order had expressly stated that it was "without prejudice" could it have avoided being an adjudication upon the merits. No such express statement appeared in the District Court's order of dismissal in this case and hence it must be treated as an adjudication upon the merits. The authorities cited by petitioner on page 20 of the petition are not to the contrary. And petitioner's reliance on the decision in *Warner* v. *Buffalo Drydock Co.*, 67 F. 2d 540 (C.A. 2, 1933) is misplaced, that decision having been rendered long prior to the adoption of Rule 41(b) by the same court which adjudicated this case. Finally, none of these cited cases or Rule 41(b) was intended in any way to limit or modify the right to a jury trial on contested factual issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 761

NATIONAL THEATRES CORPORATION,
Petitioner,

v.

BERTHA BUILDING CORPORATION,
Respondent.

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL THEATRES CORPORATION, *Petitioner*, v. BERTHA BUILDING CORPORATION, *Respondent*.	No. 761

REPLY BRIEF

Respondent in its brief nowhere even purports to meet the basic issue raised by this case—namely, whether the plaintiff in this case is entitled to a trial by jury of the statute of limitations where that defense turns solely upon whether defendant could have been sued in California under the venue and jurisdiction provisions of Sections 4 and 12 of the Clayton Act. Instead, it contends that petitioner's amenability to suit under the Clayton Act is completely irrelevant, and asserts that even if petitioner had been subject to suit in California under the antitrust laws during the relevant three-year period, the statute of limitations might still have been tolled. (Respondent's brief, pages 9-12.) To that contention we reply briefly.

At the very outset, we note that the court below, in holding that respondent was entitled to a jury trial, did not do so on the basis urged by respondent here. To the contrary, the Court below explicitly held that with respect to the California statute of limitations, the decision "depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue . . . ." (248 F. 2d 833, 835

Appendix to Petition, p. 4a.) In this respect, the decision of the Court below is clearly supported by the overwhelming weight of authority. See *Steiner* v. *20th Century-Fox Film Corporation*, 232 F. 2d 190 (9th Cir., 1956); *Klein* v. *Lionel Corporation*, 130 F. Supp. 725 (D. Del. 1955); *Winkler-Koch Engineering Co.* v. *Universal Oil Prod. Co.*, 100 F. Supp. 15 (S. D. N. Y., 1951); *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364 (S. D. N. Y., 1939); *Seaboard Terminals Corporation* v. *Standard Oil Co.*, 24 F. Supp. 1018 (S. D. N. Y., 1938).

Moreover, on its face, respondent's theory is manifestly untenable. It would be a complete paradox to hold that a defendant has been amenable to suit on an antitrust claim and yet to hold at the same time that the statutes of limitation were tolled as to that claim. Respondent's contention is wholly contrary to the basic purpose of the California tolling statute—namely, to prevent the running of the California statute of limitations against a plaintiff who was unable to present his cause of action in California because defendant was not amenable to suit there. The California statute has consistently been construed in the light of that purpose. This may be seen not only from such cases as *Chappell* v. *Thompson*, 21 Cal. App. 136 (D. C. App. 2d Dist., 1913), *Schneider* v. *Schneider*, 82 Cal. App. 2d 860 (D. C. App., 2d Dist., 1947), *Loope* v. *Greyhound Lines*, 114 Cal. App. 2d 611 (D. C. App. 4th Dist., 1952), and *Taylor* v. *Navigazione Libera Triestina*, 95 F. 2d 907 (9th Cir., 1938). It plainly appears even in the cases relied upon by respondent in its opposing brief at page 11.

Thus, it is well settled that if the defendant could have been sued in California, a plaintiff is barred from maintaining the action if he does not bring it within the time specified by the statute—here three years. This principle was, in fact, applied in the case of *Lawrence* v. *Ballou*, 50 Cal. 258 (1875), the case relied upon so heavily by respondent here. In that case, plaintiff brought an action in ejectment against E. H. Parker

and others. Thereafter, on plaintiff's motion, the Hazard Powder Company, a Connecticut corporation, was added as a party defendant. At the trial, the Court found that the Powder Company had ejected plaintiff on September 13, 1865. The action was commenced against the Powder Company on April 19, 1871. The Powder Company pleaded the five-year statute of limitations. In holding that the Powder Company was entitled to the benefit of the statute, the Court said (page 264):

> "In the present case the corporation was made a party defendant, and the complaint alleges an entry and ouster by the company, and an adverse holding of the premises since the 2d of May, 1865, and the court below found as a fact that the ouster occurred more than five years before the company was made a party defendant. It cannot be claimed that the defendant was present and in the actual occupation for the purpose of being sued, but that the court must, at the same time, ignore its presence and occupation when they are relied upon as constituting an adverse possession and defense."

Indeed, the decisions go even further. If the plaintiff can sue the defendant on the particular cause of action asserted by him and the California courts have jurisdiction to dispose of the particular controversy between the parties, the statute of limitations will not be tolled as to that cause of action even if the defendant has never been amenable to suit generally. *Ridgway* v. *Salrin*, 41 Cal. App. 2d 50 (D. C. App., 3rd Dist., 1940) is directly in point. In that case plaintiff brought a proceeding to foreclose a mortgage on lands in California against Sarah S. Salrin, a resident of Ohio, who had never lived in California. The cause of action accrued on March 13, 1929, and the plaintiff brought his action on September 29, 1937. Defendant pleaded the statute of limitations and plaintiff relied upon Section 351. Judgment was entered for defendant on the ground that the statute of limitations had

run. In affirming the judgment below, the Court speaking of Section 351, said (pp. 54, 55):

> "The foregoing section was adopted for the benefit of creditors who possess causes of action, to preserve or extend their right of action as a matter of justice during the period following the accrual of the right of action during which the debtor or the party against whom the cause exists, is absent from the state of California so that the right of action may not be lost on that account. *It follows that if the right of action is not barred or suspended by the absence of the person against whom it prevails, the running of the statute of limitations will not be thereby tolled.*
>
> * * * *
>
> "This is a suit to foreclose a mortgage lien against land in California which was conveyed by the mortgagor and owner of the land to her sister in the state of Ohio after the mortgage was executed and recorded. The grantee took title to the land subject to the mortgage, but she did not assume the obligation of the mortgage nor did she become liable for the payment of the debt for which it was executed. Since, without personal service upon the absent grantee, a deficiency judgment could not be rendered against her in California, *complete jurisdiction of the court over the land for the purpose of foreclosing the mortgage lien, was acquired by publication of the summons in spite of her absence from the state. We therefore conclude that under the circumstances of this case, the provisions of section 351 of the Code of Civil Procedure has no application, and the time for commencing this action was not tolled by the absence of the grantee.* The trial court therefore properly concluded that the suit was barred by the statute of limitations." (Emphasis added.)

See also *Mangene* v. *Diamond*, 132 F. Supp. 27 (E. D. Pa. 1955) affirmed 229 F. 2d 554 (3rd Cir., 1956)

These cases make it very clear that even if, as respondent now contends, we must look to California law to de-

termine the test to be used in applying the California tolling statute to a claim under the antitrust laws, the California courts likewise would hold that if defendant was amenable to suit under the antitrust laws during the relevant three-year period, plaintiff's antitrust claims are barred. In short, the test which the California courts would apply is the very test of jurisdiction and venue which the trial court and the court below actually held controlling.

CONCLUSION

As we have demonstrated in this brief, the proper test to be applied in determining whether the California statute has run in this case is the test of jurisdiction and venue under the antitrust laws. These tests, we submit, have been applied in contested factual situations by judges without juries from time immemorial. The decision of the court below that these issues must now be submitted to a jury constitutes such a departure from prior law as to justify review by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 840

GUMBINER THEATRICAL ENTERPRISES, INC.,
Petitioner,

v.

NATIONAL THEATRES CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CONSTITUTION OF THE UNITED STATES:

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IN THE

Supreme Court of the United States

October T m, 1957

No. .....

GUMBINER THEATRICAL ENTERPRISES, INC.,
Petitioner,

v.

NATIONAL THEATRES CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on November 7, 1957.

Citations to Opinions Below

The original opinion of the Court of Appeals and its opinion on rehearing are reported at 248 F. 2d 833. The opinion of the District Court is reported at 140 F. Supp. 909. The findings of fact, conclusions of law and order of dismissal of the District Court are not reported. All these opinions and the District Court's findings, conclusion and order are reprinted in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals on rehearing, which vacated its original judgment of September 10, 1957, and affirmed instead of reversed the District Court's judgment of dimissal, was entered on November 7, 1957. A timely petition for rehearing as to the opinion of November 7, 1957, was filed by the petitioner, considered by the Court of Appeals, and denied by that court on December 6, 1957. This petition for a writ of certiorari is filed less than 90 days after the denial of rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

The decision of the court below is not only in conflict with the decision of other Courts of Appeals but is also in conflict with the applicable decisions of this Court and departs from the accepted and usual course of handling issues of fact upon which a jury trial has been demanded. Specific questions presented are the following:

1. Whether a plaintiff's right to a jury trial in a federal court on contested factual issues relating to the defendant's plea of the statute of limitations is unfairly denied by an appellate review which disregards the existence of the disputed issues of material facts.

2. Whether a corporate defendant which has at all prior times and for all other purposes consistently maintained the separateness and identity of its subsidiaries, may at its own instance pierce its own corporate veil as well as that of such subsidiaries for the sole purpose of escaping liability for its wrongs.

3. Whether a litigant having, to its benefit and advantage, solemnly represented the truth of certain matters lying peculiarly within its own knowledge to various courts by pleadings and by sworn testimony in support thereof, will thereafter, in subsequent judicial proceedings, when its interests are different, be permitted to repudiate its prior pleadings and sworn testimony.

Constitutional and Statutory Provisions Involved

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

Sec. 48, New York Civil Practice Act:

> "The following actions must be commenced within six years after the cause of action has accrued:
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> * * *
>
> 2. An action to recover upon a liability created by statute, except a penalty or forfeiture."

Sec. 13, New York Civil Practice Act:

> "LIMITATIONS WHERE CAUSE OF ACTION ARISES OUTSIDE OF THE STATE. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action. * * *"

Sec. 19, New York Civil Practice Act:

> "EFFECT OF DEFENDANT'S ABSENCE FROM STATE OR RESIDENCE UNDER FALSE NAME. If when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued

against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply in either of the following cases:

* * *

2. While a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served."

Paragraphs 335 and 338 Code of Civil Procedure of the State of California:

"Paragraph 335. PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows * * *"

"Paragraph 338. (WITHIN THREE YEARS). Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture."

Paragraph 351, Code of Civil Procedure of the State of California:

"Paragraph 351. EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the state, the action maybe commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Statement of the Case

Petitioner, having on September 5, 1951, filed its complaint to recover damages for the loss of its Los Angeles theatre business and property (which loss, it charged, had been illegally engineered by respondent-defendant and other members of a conspiracy in violation of the federal anti-trust laws), moved for a separate trial of the issues raised by respondent-defendant's affirmative defense of the statute of limitations.[1]

Petitioner's motion for a separate trial on the limitations issue alone was granted. R. 12a. But although petitioner had incorporated a request for a jury trial on all issues in its complaint and had included a request for a jury trial in its motion for the separate trial on the issue of limitations, its requests were denied.[2] Similarly, when it renewed its request for a jury trial at the outset of the trial, that request was also denied. R. 16a. Thus the separate trial on the issues raised by the affirmative defense of the statute of limitations was held by the court without a jury.

Petitioner had, in its complaint, alleged that the applicable statutes of limitation of both New York (where

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[1] This case is a companion to one now pending before this Court on a petition for a writ of certiorari, No. 761, Oct. Term 1957, *National Theatres Corporation* v. *Bertha Building Corporation*. The two cases were consolidated in the courts below for purposes of trial and adjudication. The records in the cases were likewise consolidated. But, as appears hereinafter, the Court of Appeals rendered judgments of an opposite character in the two cases, thereby separating the proceedings as they reach this Court.

Since the records in the two cases were consolidated, petitioner in the instant case relies upon and adopts the certified record filed in this Court in No. 761. That record contains all the orders, judgments and other proceedings necessary to sustain the jurisdiction of the Court in this case and to permit this Court to consider the contentions advanced by this petitioner.

[2] Pet. App. 64a. No. 761 before this Court.

the action was filed) and California (where the action accrued) had been *tolled by reason of respondent-defendant's absence from both New York and California during the critical period between December 8, 1931 (when the cause of action accrued) and July 20, 1938.*[3]

Both the New York and California statutes of limitations contained provisions embodying the familiar principle that statutes of limitation shall not run in favor of a defendant who is absent from the state or whose entry is secret or clandestine or under circumstances not likely to give notice of his presence. It was therefore, incumbent upon respondent (which had the burden of proof as to its affirmative defense of limitations) to establish by a preponderance of the evidence that, under the applicable state law, it qualified and was entitled to escape the effect of such provisions of the statute of limitations of either New York (C. P. A. Sec. 19) or California (C. C. P. Sec. 351). Thus, the single and only issue to be resolved by the separate trial was whether or not respondent had satisfied its burden of proof in this connection.

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[3] In 1951, when petitioner's complaint was filed, there was no applicable federal statute of limitations. It was conceded that the applicable periods of limitation were six years under the New York statute of limitations (C. P. A. Sec. 48 (2)) and three years under the California statute of limitations (C. C. P. Sec. 338 (1)), which was made applicable by the borrowing provision in the New York statute (C. P. A. Sec. 13). July 20, 1938, was the date when, irrespective of respondent's presence or absence in either New York or California, the applicable statutes of both states began to be tolled by reason of the commencement and pendency of an action brought by the United States against respondent and its co-conspirators, *United States* v. *Paramount, et al.*, 66 F. Supp. 323 (S. D. N. Y., 1946), 334 U. S. 131 (1948).

Under Section 5 of the Claytor Act (15 U. S. C. 16), during the pendency of any anti-trust suit by the United States, the running of the applicable limitations statute is suspended as to every private right of action under the anti-trust laws provided the private suit is based in whole or in part on any matter complained of in the Government's action.

During the course of the trial, which was conducted by Judge Galston alone without a jury, petitioner introduced various pleadings and portions of the sworn testimony which respondent had offered and which had been admitted in prior judicial proceedings in both New York and California, (such pleadings and testimony as to New York are set forth in full in the Appendix attached, see pp. 63a to 72a). These pleadings and testimony were to the effect that the respondent had not been doing business and had no office or agent in either state and hence had not been subject to the jurisdiction of courts in those states. See, *e.g.*, R. 17a-48a.

Thus, petitioner introduced respondent's answer to the Government's 1938 complaint in *United States* v. *Paramount Pictures, Inc., et al.* (Equity No. 87-273, S. D. N. Y.), wherein the respondent specifically denied that it had a place of business at 444 West 56th Street, New York, N. Y., and averred that "its place of business" was at 2854 Hudson Boulevard, Jersey City, New Jersey. Pet. Ex. 37. See Appendix 71a to 72a.

Petitioner also introduced sworn testimony of respondent's secretary, offered by respondent in *Hillside Amusement Co.* v. *Warner Brothers Pictures, Inc., et al.* (Civil No. 13-77 S. D. N. Y.), that respondent "does not maintain an office in the territorial jurisdiction of the Southern District of New York" and that none of the officers, directors or employees of respondent maintain an office or transact any business on behalf of respondent in New York; and, from the same case, the sworn testimony of a member of the legal firm presently representing respondent, who stated under oath that of his own knowledge and at least since June 10, 1937, respondent had "no office or place of business at 444 West 56th Street or anywhere else in the Southern District of New York" and that respondent was not subject to the jurisdiction of the federal court there. R. 137a. See Appendix 63a to 69a.

The trial court, over petitioner's objections (R. 54a), permitted respondent at the trial to introduce evidence contradicting the prior sworn testimony of the character just indicated upon the explanation that all of such prior testimony was in reality a sham and part of a scheme by respondent to evade the payment of taxes in New York and California (R. 163a, 195a, 215a), whereby respondent had actually succeeded in evading the payment of state franchise and other local taxes in New York (R. 107a) and California (R. 150a) for a period of almost twenty years.

This scheme contemplated that respondent would endeavor to avoid the creation of any public record that might indicate it was doing business in New York or California (R. 195a, 215a). Thus, respondent's denial in its answer to the Government's original petition in the case of *United States* v. *Paramount, supra*, that respondent had a place of business in New York apparently induced a finding by the three-judge statutory court in the *Paramount* case that respondent's place of business was in Jersey City and avoided the appearance in the official reports of any finding in that case that respondent had a place of business at 444 West 56th Street, New York City, as the Government had originally contended. 70 F. Supp. 53, 58 (S. D. N. Y., 1947).

The trial court, as the Court of Appeals held, erroneously interpreted the pertinent state law as if the *only* requirement for avoiding the effect of the New York and California provisions suspending the running of their respective statutes of limitations was for respondent to establish that venue under the Clayton Act would have been properly laid as to the respondent in California or in New York. On the basis of this erroneous concept, the trial court held that the respondent had as a matter of law established its right to avoid the effect of the suspension provisions of the California statute of limitations. Re-

spondent's burden was found satisfied by its introduction of evidence which would have made it theoretically possible for a hypothetical judge in California before whom it would (hypothetically) have been offered to have found that venue under the Clayton Act would have been proper as to the respondent in California throughout the critical limitations period.

Having thus fallaciously found that petitioner's complaint was barred by the California statute of limitations, the trial court pointed out it was not "necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years." 140 F. Supp. at 916.

Judge Galston accordingly granted respondent's motion for judgment on the pleadings and dismissed petitioner's complaint. And as an alternative ground for dismissing the complaint, the judge found that, within the interpretation given Section 12 of the Clayton Act, respondent was transacting business in California. 140 F. Supp. at 915-916.

Along with his opinion, Judge Galston filed extensive findings of fact and conclusions of law with respect to respondent's business activities in both New York and California. (See Appendix attached hereto, pages 36a to 62a.) From their face they reveal that they are made upon the same erroneous premise as to venue that vitiates his opinion.

The Court of Appeals, in its original opinion, pointed out that the issue of limitations at the trial before Judge Galston was "not to be treated merely as one of venue," the critical question being "whether the statute bars the suits." It reversed Judge Galston's judgment of dismissal and held that petitioner was entitled to a trial by jury on the disputed issue of whether the California three-year limitation statute had been tolled by reason of respondent's

absence from California during the critical period. 248 F. 2d 833. The court held that since this issue tendered genuine issues of fact it was triable as of right by a jury if a party demands one. In the words of the court (248 F. 2d at 835, 836):

> "Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and *the need to weigh the evidence of National* to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, *against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove.* And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many ocurrences which may seem to have chameleonic attributes when interpreted, or explained.
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> " • • • *its admissions that it did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury*: that it was erroneous to refer such issues to Judge Galston for trial without a jury." (Emphasis added.)

The respondent thereupon filed a petition for rehearing. The Court of Appeals granted rehearing and, in the instant case, vacated its previous judgment of reversal and entered a judgment of affirmance. *In so doing, however, the court did not reverse its prior determination that petitioner was entitled as of right to a jury trial insofar as the issue concerning the California statute of limitations was involved.* The court held, rather, that under the New York law the action was barred if the limitations period prescribed by either California or New York had expired and that the

evidence here clearly demonstrated that "the New York statute was not tolled by National's absence from New York or by its unpublicized activity in New York." 248 F. 2d at 842. And since the action was barred under the New York statute of limitations, petitioner's right to a jury trial as to the California statute became moot.

While the opinion on rehearing merely states that "National did have officers in the state", 248 F. 2d at 841, much more than that is implicit in the decision. For in concluding that the New York statute had not been tolled, the Court of Appeals necessarily made its own finding, unsupported by any finding of the District Court or by any ascertainable evidence, that "National did have officers in the state" *continuously* during the critical period. It further found that "the documentary evidence recited in Judge Galston's findings was overwhelming" and "irrefutable" to the effect that "National was amenable to process in New York during the relevant period." 248 F. 2d at 841-842. Indeed, on this latter point, the court stated that "if the facts had been heard by a jury, Judge Galston would have been required to set aside a plaintiff's verdict on this issue."

On December 6, 1957, the Court of Appeals denied petitioner's request for rehearing as to its judgment of affirmance and this petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The decision below on rehearing, which is inconsistent with the original decision, raises an important question as to the right to a jury trial on contested issues of fact relative to a statute of limitations plea.

In its original decision dealing with this case, the Court of Appeals properly recognized that (248 F. 2d at 835-836):

> "Antitrust suits like these are triable as of right by jury if a party demands one. *Ring* v. *Spina*, 2 Cir., 166 F. 2d 546. And if National's affirmative defense based on the statute of limitations tendered genuine issues of fact, they were also as of right triable by jury. *Jelliffe* v. *Thaw*, 2 Cir., 67 F. 2d 880; *Chambliss* v. *Simmons*, 5 Cir., 165 F. 419. Applicable, to be sure, is the rule that when the evidence is so one-sided that reasonable men would not differ as to the facts proved, the judge may take the issue from the jury, but we do not regard the evidence in this record in that category * * *"

In other words, the petitioner having demanded a jury trial of all issues raised by the complaint and having moved specifically for a jury trial on the limitations plea, the petitioner became entitled *as of right* to a jury trial on the material and disputed questions of fact relative to the limitations defense.

That holding, of course, is in accord with the consistent rulings of this Court and of other federal courts that questions of material fact raised by the defense of the statute of limitations in an action at law are triable as of right by a jury, and not by a court alone. Such questions are "not questions of law for the court, but questions of fact, which should have been submitted to the jury." *Michigan Insurance Bank* v. *Eldred*, 130 U. S. 693, 699 (1889). See also *Jelliffe* v. *Thaw*, 67 F. 2d 880, 882 (C. A. 2, 1933); *Ingo* v. *Koch*, 127 F. 2d 667, 678-679 (C. A. 2, 1952); *Stornelli* v. *U. S. Gypsum Co.*, 134 F. 2d 461 (C. A. 2, 1943); *Arkansas*

Natural Gas Co. v. *Sartor*, 78 F. 2d 924, 929 (C. A. 5, 1935); *Don George, Inc.* v. *Paramount Pictures*, 111 F. Supp. 458, 471 (W. D., La., 1951).

Having applied this salutary principle so as to sustain petitioner's right to a jury trial as to the disputed facts relative to the California limitations issue, the Court of Appeals on rehearing violated the very rule it had just applied and denied petitioner the right to a jury trial as to the disputed facts involved in the New York limitations problem. It did so by applying to the trial court record a standard of review which went beyond the scope of proper appellate review and which reflected a basic hostility to the very concept of a jury trial on a limitations issue. It made unwarranted findings of its own. It gave to certain trial court findings an "overwhelming" and "irrefutable" nature which the trial court never intended, while at the same time ignoring the substantial conflicts in evidence which obviously underlay those findings. Never once did the Court of Appeals on rehearing address itself to the only relevant question on appeal—whether there were disputed issues of material fact as to the applicability of the New York statute of limitations which warranted trial by jury.

That there were such disputed issues as to the New York statute is at least as obvious, if not more so, as the existence of such disputed issues under the California statute. Under the New York statute of limitations in effect during the relevant period, at least two elements were necessary to toll the statute as to respondent: (1) one or more corporate officers had to be present continuously in the state throughout the six-year period,[4] and (2) the corporation had to be doing or transacting business continuously in New York during that period so as to make service in New York upon the officer then physically present in New York valid service on the corporation.[5] As to both elements,

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[4] *Chapin* v. *Posner*, 299 N. Y. 31 (1949); *Talmadge* v. *United States Shipping Board*, 54 F. 2d 240, 246 (C. A. 2, 1932).

[5] *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259 (1917); *Elish* v. *St. Louis Southwestern R. Co.*, 305 N. Y. 267 (1953).

there were obvious issues of fact which were properly resolvable by a jury. Yet the Court of Appeals deliberately chose to ignore the factual disputes on these points and the substantial evidence which petitioner had submitted to show that neither element had been satisfied.

The Court of Appeals was confronted with the fact that the District Court, by its own admission (140 F. Supp. at 916), found it unnecessary "to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years." The District Court thus had no occasion to direct its findings or its conclusions to the New York situation. And for that reason the Court of Appeals had to fashion its own finding as to the first element under the New York statute. It did so without reference to any finding of the District Court and without reference to any evidence in the record. It simply stated, "National did have officers in the state." 248 F. 2d 841. Apart from the fact that such a finding is deficient for its failure to state that officers were present in the state continuously for six years, the court overlooked the substantial evidence as well as certain other findings of the District Court[6] expressly declaring that respondent's officers were frequently during each year of the relevant period absent from New York on extended trips to California. On this aspect of the New York statute alone, therefore, there were substantial issues of disputed facts warranting a jury trial.

As to the second element of the New York limitations statute, the requirement that the respondent has done or transacted business in that state continuously for six years, the Court of Appeals simply referred to and quoted ten of the findings of fact of the District Court and gave to them the descriptive title of "overwhelming" and "irrefutable". But the District Court admittedly made no pretense that

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[6] See District Court findings 13(b), 13(c), 13(f) and 28, printed in Appendix attached hereto, pp. 41a to 44a and 52a.

these findings were directed in any way to the second requirement of the New York statute, which the trial judge had found unnecessary to discuss. *These findings were at most concerned with the problem of venue in New York.* To convert such findings into the critical base for tolling the New York statute of limitations is an error of a most egregious sort.

Moreover, these ten findings were in no way based upon undisputed or irrefutable evidence; and the trial judge never so indicated. These findings were merely among those submitted by the respondent and adopted by the trial judge. They represented his view as to the preponderance of evidence, which at all times had been highly disputed. And in petitioner's judgment, these particular findings for the most part are wholly unsupported by the evidence, or constitute misstatements of the evidence, or are directly contradicted by the record. But the important consideration is that these findings grew out of disputed facts in the record, as the following tabulation shows:

Findings relied upon:	*Contradicting evidence in record:*
32. National's board meetings were held in New York from 1930 to June, 1936.	Respondent's Exhibit A-2 and its own stipulation conclusively establish that the last Board meeting in New York during the critical period was on April 9, 1936, and for 8 years thereafter no meetings were held in New York. Thus there was not a *continuous* period of 6 years in which tolling was avoided.
33. National's agent, Agency, maintained an office from June 1936 to the date when this action was begun at 444 West 56th Street, New York, N. Y., in space rented from	The facts show that Agency gave up its New York office in 1942, and moved to California, long before this action was begun in 1951. R. 233a. There was also docu-

Findings relied upon:	*Contradicting evidence in record:*
Twentieth Century-Fox. All officers of Agency had their offices there and met weekly in New York until Agency opened its office in California in August, 1942.	mentary evidence that at least prior to June 22, 1936, Agency's office was in New Jersey. Pet's Ex. 19; Res. Ex. A-2. Moreover, the uncontradicted testimony showed that during at least some of the period prior to 1942 Agency's officers had their offices in New Jersey. R. 62a-63a.
34. From the date of its organization to the date this suit was commenced, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial services for National and its subsidiaries. Agency maintained a payroll for National's employees.	Agency was organized on Sept. 28, 1935 (Res. Ex. A-2), but there was no evidence of any service performed for National prior to Dec. 2, 1935. Pet. Ex. 19. The services it did perform were not "continuous" services "in New York" and Agency did not keep "National's books of account" in New York. For at least a year and a half during the crucial period, these services were performed "in Jersey City". R. 68a. The testimony also showed that the services performed were neither "substantial" nor "extensive" but pertained "to inconsequential matters". R. 125a. There was no evidence that Agency maintained a payroll for National's employees. Indeed, after December 1935 National had no paid employees either in New York City or elsewhere. R. 147a-148a.

Findings relied upon:	*Contradicting evidence in record:*
37. National continuously maintained bank accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank. It also had accounts in four other named banks.	There was no evidence whatever that any of the accounts with the five banks were maintained "continuously" during the relevant period since December 8, 1931. Some of the accounts were not even authorized until after July 20, 1938, the end of the relevant period. Res. Ex. A-2.
38. National borrowed money from time to time in New York from New York banks. Such loans were made in 1930, 1931 and 1932.	These were only isolated transactions, most of which occurred before the critical date of December 8, 1931.
39. In 1934 National in New York issued debentures to reflect its indebtedness to Fox Film Corporation. A New York bank was trustee under the trust indenture.	This was another isolated transaction, showing no continuity of activity in New York.
40. In 1935 a line of credit was established with a New York bank and loans from that bank were negotiated in 1935 and 1937.	These were sporadic activities, not showing that National was present or transacting business in New York in the statute of limitations sense.
41. From 1930 throughout the period here involved the dividends National received from its subsidiaries were received in New York, and National paid its dividends in New York. National had substantial assets.	There was no testimony or evidence in the record, documentary or otherwise, that National ever received or paid dividends in New York, or anywhere else, either before or after 1930. There was no evidence of "substantial assets" in New York. The only proof in this connection showed that National's stocks were kept in vaults in New Jersey during the relevant period. R. 101a.

Findings relied upon:	*Contradicting evidence in record:*
42. National paid no utility charges directly to any utility company, but paid a regular charge to its parent company for services such as utilities, office space and the like. From and after June 1936 payments for these facilities were made by Agency.	This finding was apparently based on certain "off the record" remarks by a witness who said he was "under the impression" National used to pay a certain amount each week to its parent company. R. 26a. Such statements, however, were inconsistent with the testimony of another of respondent's witnesses that National had no office and paid no rent at any New York address after 1930. R. 107a-108a.
43. National had no telephone listing prior to the summer of 1935. Thereafter its listing was cross-referenced to that of Agency. Prior to 1935 it had used the telephone facilities of Twentieth Century-Fox without a listing. Regular amounts were paid by National to Twentieth Century-Fox for the use of these facilities.	One of respondent's witnesses stated unequivocally with respect to the maintenance since 1930 of an office by National in New York that "they had no office there that I know of. They didn't pay any rent. * * * *They didn't maintain telephone facilities.* I think they didn't even have any stationery. * * * " R. 107a-108a.

Apart from the legal insufficiency of many of these findings to support a conclusion that National was continuously present and doing business in New York during the relevant period, the foregoing comparison demonstrates that the so-called "irrefutable" and "overwhelming" documentary evidence was in fact disputed and far from overwhelming. The ten findings relied upon by the Court of Appeals involved highly disputed factual matters as to which petitioner had a right to a jury determination.

An even more dramatic illustration of the disputed nature of the evidence relating to the application of the New York statute of limitations is afforded by the admissions in pleadings and testimony offered by respondent in prior judicial proceedings that it was not doing or transacting business in the State of New York. In its original opinion, the Court of Appeals relied heavily upon similar admissions by respondent as to its absence from California to demonstrate the existence of a jury case. The court there said that *admissions made in other proceedings that respondent "did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury: that it was erroneous to refer such issues to Judge Galston for trial without a jury."* 248 F. 2d at 836 (emphasis added).

By the same token, the sworn statements and admissions made by respondent that it did no business in New York "make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury." The refusal of the Court of Appeals to recognize that conclusion in its opinion on rehearing highlights the substantial error committed by that court—the error of denying to petitioner the right to a jury trial on contested issues of fact.

The right to a jury trial, which petitioner asserts here in the context of a civil anti-trust suit, is an important right. It partakes of the guaranty which the Seventh Amendment to the Constitution extends to trial by jury in law cases. Under the constitutional and traditional concept of this guaranty, a litigant is entitled to a jury resolution of all disputed issues of material fact. As this Court has said, "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones* v. *East Ten-*

nessee, V. & G. R. Co., 128 U. S. 443, 445 (1888). Or, as put in *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353-354 (1943):

> "The jury is the tribunal under our legal system to decide * * * issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions."

The Court of Appeals has indeed usurped the functions of the jury in this case. It has fashioned its own finding, unsupported in any way, that respondent's officers were in fact continuously in New York for purposes of the limitations statute. It has adopted certain findings of the trial court, findings made without reference to the New York limitations statute, to support the highly contested conclusion that respondent was continuously doing business in New York for the relevant six years within the meaning of that statute. In so doing, the court has erroneously disregarded the contradictory nature of the evidence underlying these findings. And the court has discriminatorily refused to apply to the New York situation the measure of a genuine issue of fact which it applied to the California situation—the sworn statements of the respondent in prior judicial proceedings that it had no office and did no business in the respective state.

The issue here is not the soundness of the conclusion that the New York statute of limitations barred this action. Nor is the issue whether the facts warrant the opposite conclusion. The only relevant question is whether the facts were sufficiently controverted to require resolution by the fact-finding body, the jury. If so, the right to a jury trial was an absolute one which cannot be diluted in the manner indulged in by the court below.

Trial by jury is a fundamental guaranty of the rights of litigants. That guaranty applies to both individual and corporate litigants and it is in no way lessened in its im-

pact when considered in the context of a treble-damage suit under the federal anti-trust laws. The Seventh Amendment, with its guaranty of jury trial rights, contains no exception as to corporate litigants or anti-trust suits.

Thus review of the decision below is essential to maintain the jury trial guaranty in an effective form. And review is particularly appropriate and necessary here in a unique situation where the court below has in effect reached conflicting conclusions on the right to a jury trial on disputed limitations issues arising out of New York and California statutes. It is a conflict which only this Court can resolve.

2. The decision below on rehearing, in treating the activities of a subsidiary as those of the parent corporation for purposes of determining that the parent was transacting business in New York, conflicts with the applicable decisions of this Court and of Courts of Appeals in other circuits.

The court below, in its opinion on rehearing, relied in substantial part upon findings (Nos. 33, 34 and 42, quoted in footnote 3, 248 F. 2d at 841-842) to the effect that the activities of respondent's subsidiary, referred to as "Agency", were the activities of respondent. It did so for the purpose of demonstrating that respondent had done or transacted business in New York within the meaning of the New York statute of limitations. But such reliance was in disregard of the uncontradicted evidence that the respondent and Agency at all times maintained their separate corporate entities. R. 234a-235a. Respondent itself is on record as stating publicly and under oath that while it is the sole owner of the stock of Agency, the corporations are entirely separate, neither is an "instrumentality of the other" and neither engages in the business of the other. Pet. Ex. 18.

The consistent judicial attitude in such circumstances has been to recognize a bona fide corporate separation and to reject any contention that a parent is necessarily doing business within a particular state merely because of the activities of its wholly owned but separate subsidiary. In *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333, 336-337 (1925), this Court held that the activity of a wholly owned subsidiary in one state "does not necessarily subject the parent corporation to the jurisdiction" of that state, since the "corporate separation, though perhaps merely formal, was real" and "not pure fiction." The corporate veil is pierced in such a situation *only at the instance of third parties seeking to prevent fraud or injustice perpetrated upon them* by the maintenance of a fictional separateness between a parent and a subsidiary. See, *e.g.*, *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415 (1932); *Moline Properties* v. *Commissioner*, 319 U. S. 436 (1943).

The rule of the *Cannon* case has been followed in *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85 (1933); *Gravely Motor Plow & Cultivation Co.* v. *H. V. Carter Co.*, 193 F. 2d 158 (C. A. 9, 1951); *Harris* v. *Deere and Co.*, 223 F. 2d 161 (C. A. 4, 1955). See also *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 175 F. 2d 900 (C. A. 2, 1949). There being no asserted or proved reason for disregarding the admitted corporate separateness between respondent and Agency, the court below erred in treating the activities of Agency in New York as the activities of respondent. And that error involved a direct conflict with the decisions of this Court in the *Cannon* and *Consolidated Textile* cases, as well as with the cited decisions of other Courts of Appeals. Certiorari is therefore necessary and appropriate to correct the miscarriage of legal principle implicit in the decision below.

3. The decision below, by refusing to acknowledge and apply to the facts of this case the doctrine of preclusion against inconsistent judicial declarations by a litigant, is in conflict with applicable decisions of this Court and of Courts of Appeals in other circuits.

Petitioner introduced uncontradicted evidence in the trial below that in prior judicial proceedings officers and agents of the respondent stated under oath, in support of formal pleadings, that the respondent had in no way transacted or done business or had an office within the state of New York. The respondent in this manner consistently maintained that its only place of business was in New Jersey and that it was not subject to the jurisdiction of any federal or state court in New York. At least one court accepted these solemn declarations and held that respondent's place of business was indeed in New Jersey. *United States* v. *Paramount Pictures, Inc., et al.*, 70 F. Supp. 53, 58 (S. D. N. Y., 1947).

Despite petitioner's arguments below, the Court of Appeals declined to acknowledge the well-settled legal principle that the respondent was precluded by these prior court declarations from asserting a contrary position in the instant proceeding even as to strangers to the prior proceedings, to the effect that it had been doing business in New York during the relevant years. Had that principle been recognized and applied here, respondent's plea of the statute of limitations would have fallen as a matter of law.

The failure of the Court of Appeals to utilize this rule in light of the uncontradicted evidence is directly contrary to this Court's recognition of the soundness of this "wise and salutary doctrine which binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made." *Sturm* v. *Boker*, 150 U. S. 312, 334 (1893). In the words of this Court in *Sample* v. *Barnes*, 55 U. S. 70, 76 (1852), to permit respond-

ent "to contradict all that he has repeatedly and formally declared, would be to allow him to falsify his solemn acts, to trifle with the settled rules of law and the practice of the courts, and would lead to endless litigation."

More recently, this Court gave recognition to this principle in *Illinois* v. *Campbell*, 329 U. S. 362, 369 (1946), where reference was made to "the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings." And in *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 513 (1953), this Court held that the appellant in that case "cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval." See also *Davis* v. *Wakelee*, 156 U. S. 691 (1895); *Missouri* v. *Chicago, B. & Q. R. R.*, 241 U. S. 533, 542-543 (1916); *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 512, 517-520 (1851).

The decision below conflicts not only with the decisions of this Court in the foregoing cases but also with the decisions of Courts of Appeals in other circuits. Thus in *Queenan* v. *Mays*, 90 F. 2d 525, 533, the Court of Appeals for the Tenth Circuit in 1937 adopted the language of this Court in *Davis* v. *Wakelee*, *supra*, that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." To the same effect, see *Chandler* v. *McKerral*, 68 F. 2d 343, 346 (C. A. 7, 1934); *Axelrod* v. *Osage Oil & Refining Co.*, 29 F. 2d 712, 729 (C. A. 8, 1928); *Livesay Industries, Inc.* v. *Livesay Window Co.*, 202 F. 2d 378, 382-383 (C. A. 5, 1953); *Texas Co.* v. *Gulf Refining Co.*, 26 F. 2d 394 (C. A. 5, 1928). As was said in *Davis* v. *Cornwall*, 68 F. 2d 522, 525 (C. A. 2, 1895), this Court in *Davis* v. *Wakelee*, *supra*, "did not consider the case upon the rules ap-

plicable to the common estoppel which springs from the misrepresentation of fact, but *put its conclusions upon the salutary doctrine of estoppel, which prohibits parties from playing fast and loose with the courts of justice.*" (Emphasis added.)

To resolve the clear conflict created by the decision below and to determine definitely the proper content and scope of the doctrine of preclusion in the situation presented by the instant case, the grant of certiorari is both appropriate and necessary.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Of Counsel:
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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 329, 330—October Term, 1956.

(Argued May 9, 1957 Decided September 10, 1957.)

Docket Nos. 24253, 24254

BERTHA BUILDING CORPORATION,
Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

GUMBINER THEATRICAL ENTERPRISES, INC.,
Plaintiff-Appellant,

v.

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

Before:

HAND, CHASE and HINCKS,
Circuit Judges.

Appeals from two judgments of the United States District Court for the Eastern District of New York, Clarence G. Galston, *Judge,* dismissing the plaintiffs' complaints in actions of treble damages for violation of the Sherman

Act, § 1-33 of Title 15, U. S. Code, on an opinion reported at 140 F. Supp. 909. *Reversed and remanded.*

Boris Kostelanetz, New York, N. Y. (Corcoran, Kostelanetz & Gladstone, Arthur Karger, Theodore E. Gladstone, and Francis J. Mulderig, New York, N. Y., on the brief), *for appellants.*

Frederick W. R. Pride, New York, N. Y. (Dwight, Royall, Harris, Koegel & Caskey, Charles F. Young and Stanley Godofsky, New York, N. Y., on the brief), *for appellee.*

Hincks, *Circuit Judge*:

These are appeals by the plaintiffs from judgments of Judge Galston, dismissing the complaints in two actions to recover treble damages under the Sherman Act. The only question presented is whether the actions were barred by the Statute of Limitations. In that connection, the crucial question is this: Was it proper for the judge instead of a jury to decide whether the defendant could have been sued in the Southern District of California between July 20, 1935 and July 20, 1938? This is critical because upon it depends the question whether the actions were barred by the Statute of Limitations when they were commenced in the Eastern District of New York on September 5, 1951; and why this is true appears from the following facts.

The Sherman Act, even after its amendment by the Clayton Act in 1914, deals with the Statute of Limitations only in § 5 of the second Act, which provides that the period during which a suit in equity, brought by the United States, shall be pending shall toll the running of the statute as

to "every private right of action * * * based * * * on matter complained of in said suit." Concededly such a suit was pending from July 20, 1938, until September 5, 1951, when these actions were begun. Except for this the law of New York controlled, and § 48(2) of the Civil Practice Act of that state fixes six years as the period of limitation for an action "to recover upon a liability created by statute." Were this the only relevant section, the action of Gumbiner Co., in which the alleged damages were all suffered before Dec. 8, 1931, would have been barred in spite of § 5 of the Clayton Act, but the action of the Bertha Building Corporation in which the damages did not end before July 4, 1935, would not have been. However, § 13 of the New York Civil Practice Act provides that when a claim "arises outside this state an action cannot be brought in this state to enforce" it "after the expiration of the time limited" by the law of the state where the claim arose, and since the claims at bar arose in California, the law of that state controls: *i.e.*, § 351 of the California Code of Civil Procedure. This provides that, if the obligor of a liability is "out of the state" when it "accrues * * * the time of his absence is not part of the time limited for the commencement of the action." It is the defendant's position that it was not "out of the state" during the three years (the period of limitation in California), before July 20, 1938, because during all that time the plaintiffs could have sued it in the Southern District of California. If this was an issue properly tried to a judge, instead of to a jury, we all agree that Judge Galston's findings were not "clearly erroneous," so that at long last the outcome turns upon the answer to the crucial question posed in the opening paragraph of this opinion.

If the issue were one of whether the venue in each, or either, of the instant suits was proper, we should agree that no jury question was presented; for it is clear that a judge

may take that issue from a jury when it arises at a trial and decide it himself just as he might have done had it been raised before trial. But though decision as to whether these suits are barred by the statute depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such supposititious suits, the critical issue in the instant actions remains whether the statute bars the suits. That issue is not to be treated as merely one of venue. A determination of this defense has a reach and a finality not inhering in any decision as to venue. For if the defense of the statutory bar is sustained, the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy: a decision as to venue, however, of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F. R. C. P. 41(b).

Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and the need to weigh the evidence of National to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove. And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many occurrences which may seem to have chameleonic attributes when interpreted, or explained.

The burden is, of course, on National to establish its affirmative defense of the limitation statute. *Pieczonka v. Pullman Co.*, 2 Cir., 102 F. 2d 432. And when the plaintiff

has made out a prima facie case of absence from the jurisdiction the burden is on the defendant to show that such absence has not tolled the running of the statute. *Banister* v. *Solomon*, 2 Cir., 126 F. 2d 740.

Antitrust suits like these are triable as of right by jury if a party demands one. *Ring* v. *Spina*, 2 Cir., 166 F. 2d 546. And if National's affirmative defense based on the statute of limitations tendered genuine issues of fact, they were also as of right triable by jury. *Jelliffe* v. *Thaw*, 2 Cir., 67 F. 2d 880; *Chambliss* v. *Simmons*, 5 Cir., 165 Fed. 419. Applicable, to be sure, is the rule that when the evidence is so one-sided that reasonable men would not differ as to the facts proved, the judge may take the issue from the jury, but we do not regard the evidence in this record in that category even without the admissions of National. However that may be, its admissions that it did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury; that it was erroneous to refer such issues to Judge Galston for trial without a jury.

We would hold further that the dismissal below cannot be sustained as one properly ordered on the pleadings. This was an alternative ground on which the order appealed from was based.

Apparently Judge Galston thought that proof that National prior to 1938 was a member of a conspiracy which was injuring the plaintiffs within California (proof essential to a recovery) would necessarily mean that National was "transacting business" in California within the meaning of § 12 of the Clayton Act and hence was entitled to prevail in its defense of the statute of limitations. In other words, he apparently thought that a fact essential to the proof of the claim also proved a defense to the claim. That analysis has indeed a superficial plausibility.

Admittedly, it is hard to see how a finding that National was not transacting business in California (without such a finding the plaintiffs cannot escape the defense of the statute) can square with a finding that National was part of a conspiracy which caused injury to the plaintiffs in California (without which no recovery can be had on the complaint). However, the apparent conflict between those findings can perhaps be solved by ascertaining which of the numerous alleged co-conspirators are proven to be such, if any, and the relationship which exists between each of them and the defendant. Not until this is done, do the cases interpreting § 12 of the Clayton Act [15 U. S. C. A. § 22] become relevant. The most recent Supreme Court discussion of this problem occurs in dictum in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, where Justice Frankfurter dissenting on another point observes that co-conspirators "as such" are not "agents" for purposes of venue.

We cannot bring ourselves to accept the suggestion in *Giusti* v. *Pyrotechnic Industries*, 9 Cir., 156 F. 2d 351, that because of the presence within the jurisdiction of one co-conspirator all foreign corporations which are alleged to be co-conspirators are amenable to process. We think such doctrine inherently unsound and in conflict with the later pronouncement in *Bankers Life, supra*. The best discussion of the problem is in *Independent Productions Corporation* v. *Loew's Inc.* (S. D. N. Y. 1957), 148 F. Supp. 460. We agree fully with the rationale and holding of Judge McGohey's opinion in that case. Thus it is conceivable that the proofs may be such that a finding that National had no agents in California and acting independently had transacted no business there, and thus has not sustained its statutory defense, is not necessarily in conflict with a finding that it conspired with others to cause injury to the plaintiffs in California. The validity of a plaintiff's ver-

dict, if one shall be returned, cannot be assessed until all the evidence is in.

Reversed and remanded for a jury trial of the issue raised by the defendant's plea.

HAND, *Circuit Judge* (dissenting):

If these plaintiffs had sued the defendant within the period from July 20, 1935 and July 20, 1938, and the defendant had moved to dismiss the actions, as it did move on several other occasions, although the judge who heard the motion might have himself decided all issues of fact, he would have been free in his discretion to refer them to a jury, either upon a trial of that issue alone, or of the whole case. Rule 12(b) of the Federal Rules of Civil Procedure provides that among the defenses that a defendant may raise by motion is "improper venue," and Rule 43(c) provides that on any motion the court may hear the matter on affidavits, or "may direct that the matter be heard wholly or partly on oral testimony or depositions"; and there can be no doubt that this provision is constitutional. In a case depending upon the party's residence, the Supreme Court said: " * * * while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject." *Gilbert* v. *David*, 235 U. S. 561, 568. Earlier in *Wetmore* v. *Rymer*, 169 U. S. 115, 121, where jurisdiction depended upon the amount in controversy, it said: " * * * it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge." See also *Lehigh Valley Coal Co.* v. *Washko*, 231 Fed. 42, 46 (C. C. A. 2). However, although the judge in an action during the critical period would have been

free to dispense with a jury, I do not see how we can say that he would have done so, and, since the defendant has the burden of proof on the issue of the statute of limitations, it failed to prove that the issue whether the defendant was "transacting business" in California would have been tried to a judge. I agree, therefore, with my brothers that Judge Rayfiel's order was wrong. Hence it follows that, if on the evidence before Judge Galston, a jury in an action brought in California might have found that the defendant had not "transacted business" in that state, the plaintiffs at bar were entitled to a verdict.

However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Ralfiel's error is immaterial. In short, I think that the defendant proved beyond dispute that it had been "transacting business" in California throughout the critical period. It will be necessary as a preliminary to deal with the plaintiffs' agreement that, regardless of whether the defendant had in fact been "transacting business," its denials that it had been in at least ten actions brought against it in both state and federal courts constituted a "judicial estoppel" against its present contradictory position. It is of course true that upon the trial in the actions at bar any statements made by the defendant in its pleadings and affidavits in other actions were competent evidence in favor of the plaintiffs; but I can find no warrant for the theory that they created a "judicial estoppel," except suggestions in one or two law reviews. Moreover, since such a doctrine is plainly contrary to the underlying basis of the whole doctrine of estoppel by judgment it is plainly without foundation. Judgment by estoppel is not designed as a moral sanction against inconsistency: it does not visit penalties upon those who take one position today and deny it tomorrow; it is designed only to prevent a

party who has, or has not, prevailed upon an issue in an earlier action to vex the same antagonist with the same dispute in a later one. The plaintiffs cite *Houghton* v. *Thomas*, 220 App. Div. 415, to the contrary, but Mack, the party against whom the estoppel there prevailed, although not a party to the earlier action, had been the attorney of one of the parties, which the court held to be the equivalent—itself a very doubtful extension of the doctrine.

The only issue therefore is whether the evidence before Judge Galston was in enough conflict to entitle the plaintiffs to a trial by jury. That makes it necessary to decide what § 12 of the Anti-Trust Act means by "transacting business." Section 7 had allowed an action to be brought in any district in which the "defendant resides or is found" and in the case of corporations this became "often an insuperable obstacle to" any remedy. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 374. The Supreme Court there held that in § 12 Congress added the clause, "transacts business," in order to assist the enforcement of the act by ridding actions of the web of refined decisions that had been woven about the word "found." It made no attempt, however, to state in general terms what constituted "transacting business" beyond saying (p. 373), that a corporation did so in any district "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." However, the Court discussed the issue at length in *United States* v. *Scophony Corporation*, 333 U. S. 795, 807, 808. In that case the defendant, a foreign corporation, had, as here, "transacted business" by means of a subsidiary corporation whose conduct it reserved the right to supervise and regulate. It is true that the issue was whether that made the defendant "found" within the district where it was sued, but since the Court held that it did, *a fortiori*, it was a ruling that the defendant had been "transacting business" there. Therefore, it

seems to me that we can, and indeed must, take what was said as an authoritative gloss upon § 12. The Court declared that the statute meant the "practical everyday business or commercial concept of doing or carrying on business 'of any substantial character' "; and that the amendment had substituted "practical business conceptions" in place of "the previous hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence."

Judge Galston made very detailed findings that are too long and too many, to quote, but I append numbers 10, 11 and 12, because these succinctly state the facts that appear to me to be controlling. The plaintiffs object that these improperly imputed to the defendant such of the described activities as took place after the organization of a corporation, which the findings speak of as "Agency":—a wholly owned subsidiary whose officers were "in the main" the defendant's officers. I rely upon the following language in *United States* v. *Scophony Co., supra* (pp. 814, 815), which seems to me to make "Agency's" business "business transacted" by the defendant: "The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in American Scophony's affairs. We need not decide whether, in view of the agreements' continuing and persuasive effects, they could be considered as sufficing in themselves to make Scophony 'found' within the New York district. Whether so or not, they set the pattern for a regular and continuing program of patent exploitation requiring, as we have said, Scophony's constant supervision and intervention."

I cannot see why this language does not apply almost literally, *mutatis mutandis*, to the contract of December 2, 1935, between the defendant and "Agency" along with

which the defendant assigned to "Agency" the contract of Skouras Brothers of June 13. Of course it is true that a jury might not have believed the testimony offered by the defendant as to what was done under these contracts, although they did not put in any evidence to contradict it. Moreover, there might be a difficulty, if there had been no evidence that "Agency" had ever acted under the contract. However, that the plaintiffs may not assert, for it would cut the ground from under the complaints, which are based upon acts of the defendant after the contracts had been made. Hence, if the jury disbelieved the testimony of the defendant's witnesses as to what they had done, they must assume that other persons committed the wrongs charged in the complaints, and yet that they did not do so in performance of the contract with "Agency," for that contract, if once in effect, set up a "program" of "constant supervision and intervention"; and made the defendant "transact business." Surely we are not warranted in treating seriously such a web of dialectical fantasy.

The only evidence that the plaintiffs produced was the defendant's repeated assertions that it did not do any business in California, and had no agents there. Although, as I have said, these were indeed admissible against it, they amounted to no more than statements of the legal result of whatever the defendant had done, and they raised no issue as to the authority vested in the Skouras Brothers by the contract of June 13, 1935, and in "Agency" thereafter. Any conduct in California in performance of those contracts *ipso facto* made the defendant "transact business" in that state, no matter how often the defendant chose to deny that that had been the legal effect of what was done. I need not therefore answer the argument that all parties to a conspiracy are not mutual agents in the sense that

what any one of them does is a "transaction of business" of all the rest.

In conclusion it seems to me worth while to observe that, although the result of my brothers' reasoning will indeed require the defendant to defend on the merits actions arising under the Anti-Trust Acts, toward which the Supreme Court, especially of late, has shown particular favor, it does so at the expense of a precedent of the greatest value to large corporations doing a wide interstate business. I cannot see why, if what we are deciding is right, a corporation by doing its local business through subsidiary corporations over whom it retains supervisory control, will not compel those whom it may damage to sue in some district where it can be "found," as distinct from any one in which it "transacts business." If so, the whole purpose of the amendments to § 12 will be defeated.

APPENDIX

"10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as 'Agency.' Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other accounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1933. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

> 'It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection * * *.'

Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was formed. After the organization of Agency, the fixed salaries were paid by that company pursuant to the assignment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National."

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 329-330—October Term, 1956.

(Petition filed Sept. 24, 1957 Decided November 7, 1957.)

Docket Nos. 24253-4

BERTHA BUILDING CORPORATION,
Plaintiff-Appellant,

—v. —

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

GUMBINER THEATRICAL ENTERPRISES, INC.,
Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

Before:

HAND, CHASE and HINCKS,
Circuit Judges.

On Petition for Rehearing

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY, New York, N. Y. (John F. Caskey, Frederick W. R. Pride, Charles F. Young, Stanley Godofsky, of counsel), *for petitioner National Theatres Corporation.*

CORCORAN, KOSTELANETZ & GLADSTONE, New York, N. Y. (Boris Kostelanetz, Arthur Karger, Theodore E. Gladstone, Francis J. Mulderig, of counsel), *for plaintiffs.*

PER CURIAM:

By its petition for rehearing the defendant, National, persuades us to amplify and modify our original opinion and decision.

We are unmoved by the petitioner's contention that we were wrong in asserting that a dismissal based upon a defense of the statute of limitations is an adjudication on the merits. *Warner* v. *Buffalo Drydock Co.*, 2 Cir., 67 F. 2d 540, which is cited in support of that contention, we think is distinguishable. And moreover, it has been superseded by the clear mandate of Rule 41(b) of the Federal Rules of Civil Procedure which in its last sentence directly contradicts the holding of the *Warner* case. Although under the rule in a proper situation the District Judge may specify that his order be without prejudice, Judge Galston did not so qualify his order of dismissal.

We think, however, that National is right when it now urges that we failed to consider the impact of the New York statute of limitations on the Gumbiner cause of action. The Bertha cause of action arose in 1935 which was within six years of the *Paramount* action. Thus as to Bertha the six-year New York statute, C. P. A. § 48(2), could not possibly have run and the crucial question was whether the

three-year California statute had run, as we correctly stated in the opening paragraph of our original opinion. However, in the *Gumbiner* case there was another question equally crucial, viz., whether the New York statute of limitations had run. For the Gumbiner cause of action accrued on December 8, 1931. Thus if the New York statute was not tolled by National's absence, the Gumbiner action was barred here in December, 1937. Section 13 of the New York Civil Practice Act * is alternative in operation: if the statute has run either in California *or* in New York the suit is barred here.

Gumbiner argues that the New York law should determine whether in fact the statute has been tolled. From this premise it asserts that under state law, although National may have been amenable to process in New York, the statute was nevertheless tolled during that period. This argument derives from an analogy to an individual debtor who has hidden out in an obscure part of the state under an assumed name. If a creditor can find him, such a debtor is amenable to process: but while he is thus hiding the statute of limitations is tolled. Gumbiner thus concludes that even if National was amenable to process in New York, its presence was not open and notorious and on that account the statute was tolled during the relevant period.

Even if New York law does determine tolling (a proposition we need not decide in this case), this argument is fallacious. For the tolling statute (C. P. A. § 19) ** during

* Section 13 in pertinent part reads as follows:

"Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action * * *."

** The main paragraph of § 19 in its present form reads:

"If when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time

the relevant period had a subdivision (2), which declared "Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served." On the record in this case that section was applicable: National did have officers in the state. Gumbiner would read in a further requirement of open and notorious conduct. But all of the New York cases cited in support of this proposition are concerned with individual defendants, most of whom have just entered the state or have just returned to it. Not one case applies an "open and notorious" requirement to a foreign corporation otherwise amenable to process throughout the statutory period. Indeed, in *Mack* v. *Mendels*, 249 N. Y. 356, 164 N. E. 248, Judge Lehman admonishes the courts construing C. P. A. § 19 to read it as the Legislature wrote it and not to imply further requirements.

Gumbiner further urges that National was not amenable to process in New York under either federal or state standards. We disagree. A careful review of the evidence before Judge Galston on the question of whether the New York statute was tolled has convinced us that, if the facts had been heard by a jury, Judge Galston would have been required to set aside a plaintiff's verdict on this issue. Even though the jury might have disbelieved every one of defendant's witnesses, the documentary evidence recited in Judge

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limited therefor, after his coming into or return to the state. If after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action."

Galston's findings was overwhelming.* Regardless of which standard is applied it is irrefutable that National was amenable to process in New York during the relevant period. *United States* v. *Scophony Corp.*, 333 U. S. 795; *Pomeroy* v. *Hocking Valley R. Co.*, 218 N. Y. 530, 113 N. E. 504; see also *Chaplin* v. *Selznick*, 293 N. Y. 529, 58 N. E. 2d 719.

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* The following findings of Judge Galston were based solely on a stipulation and on evidence corroborated by documentary evidence.

"32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i.e., from December 5, 1934, to January 3, 1936.

"33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y., in space rented from Twentieth Century-Fox. All officers Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

"34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the payroll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

"37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

"38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $9,350,000 from the Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with

We now hold, therefore, that the Gumbiner action, since the New York Statute was not tolled by National's absence from New York or by its unpublicized activity in New York, is barred and that the District Court's dismissal of that action must be affirmed.

However, the majority of the court adheres to its holding that since the question of tolling in California presents substantial fact questions the *Bertha* case must be reversed and remanded for trial by jury on the limitations question.

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the bank in order to borrow money. As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

"39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's indebtedness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

"40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

"41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

"42. National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

"43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation." Prior to 1935 it had used the telephone facilities of Twentieth Century Fox without a listing and all calls came in through the Twentieth Centry Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century Fox."

In addition, several contracts are in the record which list 444 W. 56 St., New York City, as National's office address and the address to which notices may be sent. In a "Consent of Guarantor" defendant is stated to have an office and place of business in New York City.

Petition granted and our previous decision is modified to provide

As to the Gumbiner case, affirmed.

As to the Bertha case, reversed and remanded.

Judge HAND again votes to affirm both judgments for the reasons stated in his earlier opinion and without passing on the opinion now rendered in the Gumbiner appeal.

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UNITED STATES DISTRICT COURT

Eastern District of New York

Civil Action No. 12073—March 28, 1956

Bertha Building Corporation,

Plaintiff,

against

National Theatres Corporation,

Defendant.

Civil Action No. 12074

Gumbiner Theatrical Enterprises, Inc.,

Plaintiff,

against

National Theatres Corporation,

Defendant.

Appearances

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GALSTON, *D. J.*

Pursuant to an order dated June 25, 1954 of Judge Rayfiel, a separate trial on the issue of the statute of limitations was conducted in two actions brought under the Clayton Act, 15 U. S. C. A., Section 1 et seq., against the defendant National Theatres Corporation. The actions were tried together. At the time of trial motions were made pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings.

The plaintiffs are California corporations, owning and operating theatres in the City of Los Angeles, California.

The complaints contain substantially identical allegations of conspiracy differing only in order of arrangement of the paragraphs and in the specific details of damage to the particular plaintiff.

It is important to note that in the very first paragraph of the complaint concerning jurisdiction it is alleged:

> "* * * the unlawful acts done in pursuance thereof, have been and were conceived, carried out, made effective and performed in part, within this District of the Court and elsewhere in New York and in Los Angeles, California, and throughout all parts of the United States."

Significant allegations are set forth as to the activities of operating subsidiaries of affiliates of the defendant in California. The defendant contends that the compelling inference must be that defendant, within the meaning of the Clayton Act, transacts business and is "found" within the State of California:

> "Wherever in this complaint it is alleged that any acts were done by any THEATRE OPERATING SUBSIDIARY of NATIONAL, plaintiff alleges that all of those acts were done at the behest and instigation of NATIONAL and were caused to be done by NATIONAL pursuant to the unlawful combination and conspiracy of which NATIONAL was a member, all as will be more completely set forth below.

"Unless otherwise specified, reference to NATIONAL in this complaint is intended to include NATIONAL and any theatre operating subsidiary or affiliate thereof as the context requires. * * *"

"NATIONAL has, at all times mentioned in this complaint and since prior to 1930, controlled certain theatre operating companies which at all times mentioned in this complaint and since prior to 1930 have owned, controlled, leased or operated upwards of five hundred (500) theatres in the states of California, Missouri, Washington, Arizona, Kansas, Illinois, Oregon, Colorado, Utah, New Mexico, Wyoming, Idaho, Montana, Nebraska, Michigan and Wisconsin."

The plaintiffs define their own terms:

"10. *Conspirators.* The term 'Conspirators' whenever used in this complaint is intended to include, but is not necessarily limited to each and any or all of the following: * * * and in addition to them, the defendant NATIONAL THEATRES CORPORATION, hereinafter referred to as NATIONAL and the other defendants herein.

"11. *Theatre Operating Subsidiaries of the Conspirators.* The term, 'Theatre Operating Subsidiaries of the Conspirators' is intended to include and designate those subsidiaries and affiliates of each or any or all of the CONSPIRATORS hereinbefore designated which own, control, lease or operate or have any interest in any motion picture theatre or theatres."

With respect to the conspiracy, each complaint alleges:

"Prior to January 1st, 1930, the defendant NATIONAL, and the other defendants herein and the MAJOR DISTRIBUTORS and certain producing and distributing corporations affiliated with or controlled by or controlling them, entered into an unlawful combination and conspiracy to restrain and to monopolize inter-

> state trade and commerce in motion picture films throughout and in all parts and places of the United States. The members of this unlawful combination and conspiracy have hereinbefore been identified and designated as the CONSPIRATORS."

Trade practices were put into effect in California pursuant to the alleged conspiracy which had as their object discrimination against so-called independent exhibitors, including the plaintiffs, to the advantage of the theatre-operating subsidiaries of the conspirators, including the theatre-operating subsidiaries of the defendant National in Los Angeles. Various means of effectuating the discrimination against the plaintiffs in Los Angeles are described, such as block booking, blind buying, uniform runs and clearances, fixing minimum admission prices and entering into joint theatre-operating agreements.

Overt acts of the conspirators in effectuating the conspiracy are charged:

> "In pursuance of said combination and conspiracy the said CONSPIRATORS, including as aforesaid the defendant herein NATIONAL, and affiliated corporations engaged in the practices and entered into the agreements and committed the acts herein alleged, all of which, unless otherwise stated, have been continuously and periodically done from the time of the formation of said conspiracy to July 20th, 1938, and subsequent thereto."

Certain practices are then described which are alleged to have been put into effect to favor the theatre-operating subsidiaries of National, and to discriminate against independent exhibitors, including plaintiffs in Los Angeles. For example:

> "During all times mentioned in this complaint and since prior to 1930, the CONSPIRATORS have excluded independent exhibitors, including the plaintiff, from the business of operating first and/or second run theatres and the business of exhibiting pictures on the first and/or second run in the City of Los Angeles

and in other cities of the United States with a population of over 100,000."

In Count Two of each complaint, it is alleged that there was a monopoly and conspiracy to monopolize the exhibition of motion pictures by National and its subsidiaries in certain areas, including specifically the State of California and particularly the City of Los Angeles. Means to effect the alleged monopoly are set forth:

> "2. NATIONAL and NATIONAL'S wholly owned subsidiary, Fox West Coast Theatres, Inc., a California corporation, with principal offices in Los Angeles, California, secured control of approximately Two Hundred and Sixty (260) theatres in the said states of California, Arizona, Nevada and New Mexico, which were organized and grouped into a circuit known as Fox West Coast Theatres, Inc.
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> • • •
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> "4. NATIONAL coerced, induced or persuaded or forced the operators of theatres in said states, including the plaintiff, to cease operating their theatres either so that NATIONAL or its THEATRE OPERATING SUBSIDIARIES could acquire such theatres or have removed the competition which such theatres in the hands of independent operators offered."

It is conceded that the Bertha cause of action accrued July 4, 1935, the Gumbiner December 8, 1931. It is from those dates that computations must be made as to the running of the statute of limitations.

Both actions were commenced in 1951, which is prior to the effective date of the four year federal statute of limitations (Section 4B of the Clayton Act, 69 Stat. 283, 15 U. S. C. A., Section 15B), and therefore the applicable statute of limitations is determined by reference to the law of the state in which the action is pending. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906); *Hoskins Coal*

& Dry Dock Corp. v. *Truax Traer Coal Co.*, 191 Fed. 2d 912 (7th Cir. 1951), cert. den'd 342 U. S. 947 (1952); *Schiffman Bros* v. *Texas Co.*, 196 Fed. 2d 695 (7th Cir. 1952).

A federal court in applying the state statute of limitations applies the entire statute, including the statutory borrowing provisions relating to causes of action accruing in foreign jurisdictions. *Winkler-Koch Engineering Co.* v. *Universal Products Co.*, 79 Fed. Supp. 1013 (S. D. N. Y. 1947); *Hansen Packing Co.* v. *Swift & Co.*, 27 Fed. Supp. 364 (E. D. N. Y. 1939); *Seaboard Terminals Corporation* v. *Standard Oil Co.*, 24 Fed. Supp. 1018, aff'd 104 Fed. 2d 659 (2d Cir. 1939).

The New York statute, Article II of the Civil Practice Act (2d Ed. Cahill-Parsons 1955) contains a borrowing clause in Section 13:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of either this state or of the state or county where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply * * *"

Thus, under Section 13, if a cause of action is barred in the state where it arose, it will also be barred in New York against a non-resident, regardless of whether the period of time allowed by the New York statute of limitations has or has not run. *Isenberg* v. *Ranier*, 145 App. Div. 256 (1st Dept. 1911); *Kirsch* v. *Lubin*, 131 Misc. 700 (Sp. Ct., N. Y. Co. 1927), aff'd 223 App. Div. 826 (1st Dept. 1928), aff'd 248 N. Y. 645 (1928); see Report of New York Law Revision Commission, N. Y. Legis. Doc. 1943, No. 65, pages 142, 164.

The applicable California statute of limitations is three years. California Code of Civil Procedure, Section 338-1.

In consequence, the causes of action alleged in the Bertha case were barred as of July 4, 1938, and the Gumbiner Theatrical case as of December 8, 1934, unless the statute was tolled. If it is established that the California statute was not tolled, then nothing more need be considered, since both limiting dates are prior to the institution of *United States* v. *Paramount et al.* (S. D. N. Y. Eq. No. 87-273). This action the plaintiffs claim tolled all statutes of limitation.

Basically though, the plaintiffs allege that the California Statute of Limitations was tolled by Section 351 of the California Code of Civil Procedure:

> "Sec. 351. EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Accordingly the California courts have construed that section in accordance with its stated purpose: to prevent the running of the statute of limitations against a plaintiff who was unable to present his cause of action in California because the defendant was not amenable to the process of the California courts. See *Chappell* v. *Thompson*, 21 Cal. App. 136, 131 Pac. 82 (D. C. App. 2d Dist. 1913); and *Schneider* v. *Schneider*, 82 Cal. App. (2d 860, 187 P. 2d 459 (D. C. App. 2d Dist. 1947).

Therefore, the question presented is whether the defendant National Theatres was amenable to suit in California under the Anti-Trust Act. This question is in part solved by the Clayton Act, Section 12, 15 U. S. C. 22, which reads as follows:

> "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only

> in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found."

Thus to determine venue it must be decided whether within the meaning of Section 22 of the Act, National Theatres was an inhabitant of California, could have been found there, or transacted business there. The term "transacted business" in Section 22 has a particular meaning which is independent of other definitions of the term in state and federal courts. See *United States* v. *Scophony Corporation*, 333 U. S. 795 (1948).

California authorities support the position taken by the defendant. In *Steiner* v. *Twentieth Century-Fox Film Corporation et al.*, (Unreported, No. 12944-P. m. Civil, S. D. of California, Central Division, July 22, 1953) it was held that if

> "National Theatres engaged in the acts constituting the alleged conspiracy since 1935, all of which are alleged to have occurred in the State of California, then it was certainly doing business in the State of California sufficient to make it responsive to process of the courts of California, and this is true whether it was done directly by National Theatres Corporation or acting through its agents, the other members of the alleged conspiracy. Squarely in point is the Ninth Circuit case of Giusti v. Pyrotechnic Industries, 156 Fed. 2d 351, cert. denied 329 U. S. 787." *

In *E. B. DeGolia* v. *Twentieth Century-Fox Film Corporation et al.* (Unreported, Civil Action No. 32,514, September 9, 1953 and April 12, 1954, D. C. N. D. of Calif., Southern Division) the court reaffirmed the principle enunciated in the *Giusti* case (cited in the *Steiner* case *supra*) that

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* Reversed and remanded on other grounds (9th Cir.) March 15, 1956.

venue is proper as to all conspirators in the district in which the impact of the conspiracy caused the damage to the plaintiff. See also *Taylor* v. *Navigazione Libera Triestina*, 95 Fed. 2d 907.

Authorities in other states have held to the same effect. In *Ross-Bart Theatres* v. *Eagle Lion Films, Inc.* (unreported, Civil Action No. 1576, Eastern District of Virginia, Norfolk Division, February 17, 1954) the plaintiff there moved to quash process in an anti-trust action and for dismissal of the action for improper venue. In denying the motion the court said:

> "The motion must be denied. Section 12 of the Clayton Act, 15 U. S. C. A. 22, said the Court in United States v. Scophony Corp. (1947) 333 U. S. 795, 808, intended that a 'foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating * * * to its headquarters defeat or delay the retribution due'. This conclusion was also the clear implication of Eastman Co. v. Southern Photo Co. (1925) 273 U. S. 359, 373. The result is that if the defendant was by itself or through others participating in any business combination or conspiracy in this district in 1948 in such a manner as to violate the anti-trust acts, it was suable here in 1953 no matter its then location. Further, for this purpose it could be reached with process running out of this Court wherever it was an inhabitant or was to be found. * * * the Court holds that the sworn charges of the combination and conspiracy in this district, and the commission of acts in the district pursuant thereto directly or by coconspirators admittedly present here sustain venue in the eastern district of Virginia."

To the same effect is *Don George Inc.* v. *Paramount Pictures*, 111 Fed. Supp. 458 (W. D. La., 1951). In that case the court relied on the interpretation given Section 12 of the Clayton Act in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927). See also *Hansen Packing Co.* v. *Swift & Co.*, 27 Fed. Supp. 364.

In *United States* v. *National City Lines*, 334 U. S. 573 (1947) the court said, in discussing the changes enlarging the venue provisions under the original Sherman Act and the Clayton Act:

> "The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries." (p. 583)

So on the basis of the allegations in the complaints, under Section 12 of the Clayton Act, 15 U. S. C. 22, the court sitting in California could have had jurisdiction over the defendant.

In these circumstances the decisions of the California courts compel the conclusion that Section 351 of the California Code is not applicable in the cases at bar, and the statute of limitations was therefore not tolled. The actions were therefore barred as of July 4, 1938 in the Bertha case, and as of December 8, 1934 in the Gumbiner case.

Defendant's motion for judgment on the pleadings under Rule 12c of the Federal Rules of Civil Procedure is granted and the complaints are dismissed.

Before proceeding to an alternative method of reaching the same result on the facts as adduced at the trial, the objections made by plaintiff to the inconsistent positions that have been taken by defendant in reference to doing business or transacting business in California may be considered. Plaintiffs urge that since defendant has previously taken the position, in other actions, that it was not doing business in California, defendant should now be precluded or estopped from changing its position.

Under the present rules of Federal Practice, inconsistent defenses are specifically permitted, Rule 8e (2). If this is allowed in the same action, it is difficult to sustain the position that defendant should not be allowed to plead in separate and distinct actions either one or both defenses.

Moreover the plaintiffs have not shown that in any of the actions in which such inconsistent plea was made it was sustained. In fact, evidence at the trial was to the effect that National, in each instance where the plaintiff did not seek dismissal, appeared and defended the action on the merits. This being so, the cases cited by plaintiffs are not in point. See *Philadelphia, W & B R. R.* v. *Howard*, 13 How. 307 (1851); *State Compensation Ins. Fund* v. *Proctor & Schwartz, Inc.*, 102 Fed. Supp. 451 (E. D. Pa. 1952); *Queenan* v. *Mays*, 90 Fed. 2d 525 (10th Cir. 1937), cert. den'd 302 U. S. 724; *Chandler Laboratories* v. *Smith*, 88 Fed. Supp. 583 (E. D. Pa. 1950).

Plaintiffs also rely on a note in 59 H. L. R. 1132 (1946), but at page 1136 the following point is established:

> "* * * the courts do not usually preclude a party who has been inconsistent as to the law rather than as to facts. This result is probably reached on the reasoning that, historically, switching one's legal grounds in a suit has never been regarded with the same disfavor as maintaining inconsistent positions as to the facts. Clark-Code Pleading 1928 (p. 434)."

It cannot be too strongly emphasized that the facts are determinative of the issue whether the defendant was doing business or "found" during the times in question. Certainly there is no statutory act which precludes or estops the defendant from maintaining its present position. Nor indeed has the plaintiff been able to show that an equitable estoppel should be charged against the defendant. It may be observed in this connection that there is no showing by the plaintiffs that the plaintiff was prejudiced by the legal defenses which the defendant may have raised in other actions to which the plaintiffs were not parties. I repeat: the facts themselves are determinative of the issue.

The *Scophony* case (*supra*) makes it clear that "transacting business" must be interpreted in the light of the

nature of the activities of the corporation, and that a list of minor matters incident to doing business is not conclusive. Among such items which the court listed as not being valid criteria were: Maintaining an office, warehouse or place of business, owning realty or other physical property; keeping a staff of employees; keeping a telephone or listing, etc.

It was upon the absence of similar incidents of transacting business that plaintiffs here have heavily relied: lack of ownership of real estate, as lessee or tenant; nonpayment of local taxes; not maintaining a staff of employees: location of record books, and not maintaining an office.

However, on the overall consideration of all the facts, including those relating to the nature of National Theatres Corporation as a holding company which took an active part in the affairs of its subsidiaries, it must be concluded that National transacted business in California during the period in question, and no less certainly could thus be "found" in California.

National was parent and grandparent in an intricate multi-corporate structure, and through that structure engaged in the business of exhibiting motion pictures. Approximately two hundred theatres were located in California. Charles P. Skouras and Spyros Skouras were general managers of National pursuant to contracts dated January 19, 1932 and June 13, 1935, and were present in California transacting business of the corporate structure and of direct interest to National. Charles Skouras actually established his office and resided in Los Angeles. National Theatres guaranteed performance by its subsidiary, National Agency Corporation, of the employment contract of J. J. Sullivan which was to be performed in California. John B. Bertero performed many specific services for National in California. National participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres, from February 1933 to February 1935 in the United States District Court for the Southern District

of California; and National purchased, in California, the assets of the bankrupt estate at the trustee's sale in Los Angeles.

So as alternative grounds for dismissing the complaint as barred by the California statute of limitations, I find as a matter of fact that within the interpretation given Section 12 of the Clayton Act, 15 U. S. C. 22, in *United States* v. *Scophony Corp.*, 333 U. S. 795 (1947), and *Eastman Kodak* v. *Southern Photo Materials Company*, 273 U. S. 359 (1927), National Theatres was transacting business in California.

In the light of the foregoing analysis it is not necessary to this decision to pass upon the effect of the institution of the action of the *United States* v. *Paramount* on July 20, 1938. By that time the claims of both plaintiffs herein were barred by the statute of limitations in California. By no stretch of the imagination in such circumstances can it be held that the institution of the anti-trust suit filed by the United States against Paramount and other defendants, including National, can revive the dead issue, despite the provisions of 15 U. S. C. A., Section 16, which reads:

"• • •

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Nor is it necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years. It is sufficient for that purpose to refer to the findings which will be filed concurrently with this opinion. They are necessarily multiple because of the voluminous record.

It has been said truly that a statute of limitations is a statute of repose. See *Wood* v. *Carpenter*, 101 U. S. 135, in which it was said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

Defendant was amenable to suits in both California and New York, and they should be precluded from maintaining actions sixteen and twenty years respectively after the alleged causes of action accrued. The complaints are dismissed.

Settle orders.

/s/ Clarence G. Galston
U. S. D. J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 12073

March 28, 1956

BERTHA BUILDING CORPORATION,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

Civil Action No. 12074

GUMBINER THEATRICAL ENTERPRISES, INC.,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

In conformity with my opinion in these cases, I make the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiff in each action is a corporation organized and existing under the laws of the State of California.

2. The cause of action alleged by Gumbiner Theatrical Enterprises, Inc. against the defendant accrued on December 8, 1931, in California.

3. The cause of action alleged by Bertha Building Corporation accrued no later than July 4, 1935, in California.

4. Defendant National Theatres Corporation (hereinafter referred to as "National") is a Delaware corpora-

tion, incorporated under the name of Wesco Corporation prior to 1930. During all of the periods of time here involved it was engaged in the business of exhibiting motion pictures through theatres which were owned or leased and operated by its direct and indirect wholly owned subsidnaries. During all of such periods certain of such wholly-owned subsidiaries operated approximately two hundred theatres in the State of California. National was a wholly-owned subsidiary of Twentieth Century Fox Film Corporation (then known as Fox Film Corporation) from prior to 1930 until November 14, 1934. On this latter date National was reorganized in New York and The Chase National Bank of the City of New York acquired 58 per cent of the stock of the company. In 1943, Twentieth Century-Fox reacquired the bank's interest and National again became a wholly owned subsidiary of Twentieth Century-Fox.

5. On January 19, 1932, National entered into a written contract employing Spyros P. Skouras, Charles P. Skouras and George P. Skouras as general managers of its entire business and the business of its subsidiaries. Among other things, the contract provided:

> "(3) So far as permitted by law, the Managers shall have full authority to direct, manage and operate all of the business and affairs of Wesco • • • and, in so far as Wesco during the term of this agreement controls the business and affairs of its subsidiary companies, to direct, manage and operate the business and affairs of such subsidiary companies."

Pursuant to this agreement two of the Skouras brothers, Spyros and Charles, entered upon their employment by National at or about the date of said agreement and, in fact, acted as the managers of the entire business of National throughout the country.

6. Pursuant to the agreement of January 19. 1932, Spyros P. Skouras was elected president and a director of

National which position he held until November, 1934, when Sidney R. Kent, president of Twentieth Century-Fox, was elected president of National. Spyros P. Skouras was elected executive vice-president at that time. His duties and the services performed by him, however, remained the same. Spyros P. Skouras continued as executive vice-president and one of the general managers of National until April, 1942, when he succeeded Mr. Kent as president of Twentieth Century-Fox. Thereafter he became Chairman of the Board of National.

7. Pursuant to the contract of January 19, 1932, Charles P. Skouras in about March, 1932, established his office as co-general manager of National at 1609 West Washington Boulevard, Los Angeles, California, such address being that of a building maintained by Fox West Coast Theatres, a wholly-owned subsidiary of National. Mr. Skouras also established his residence in Los Angeles. At or about that time he became an officer and director of all of National's West Coast subsidiaries, and continued as such during all of the periods here involved. In April, 1942, he was elected president and employed as general manager of National. He maintained his office and residence in Los Angeles continuously from March, 1932, until his death in 1954. The office maintained by him in Los Angeles was, in effect, the western office of National.

8. The two Skouras brothers, as general managers of National, were equal in the scope and extent of their authority. From in or about March, 1932, they were in day-to-day communication. Though Charles P. Skouras maintained his office and residence in California, his activities were not confined to the operation of National's affairs in that state; along with his brother and co-general manager, he was active in all phases of National's business throughout the country. He was also an officer and director of many of National's subsidiaries which operated in states other than California.

9. The contract of January 19, 1932, between National and the Skouras brothers was terminated on November 3, 1934. Negotiations for a new contract were then entered into which resulted in an employment contract dated June 13, 1935, whereby National again employed Spyros P. Skouras and Charles P. Skouras as general managers of its entire business for a period ending December 31, 1944. There was no interruption of the managerial and executive duties of the managers between November 3, 1934 and June 13, 1935, or of the services performed by them. Though the contract provided that National's rights to the services of the managers could be assigned to any service or operating subsidiary of National, the contract also provided that:

> "Notwithstanding any such assignment, the Corporation shall remain unconditionally liable as principal obligor for all obligations to be performed by it hereunder to the extent the same are not fully and finally performed by any such assignee, and the Corporation and the Managers shall retain all their rights hereunder, including without limitation any right to terminate this Agreement or enforce any of the provisions thereof for their own benefit, to the same extent as though no such assignment had taken place."

10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as "Agency". Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other accounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1935. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

> "It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection * * *."

Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was

formed. After the organization of Agency, the fixed salaries were paid by that company pursuant to the assignment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National.

13. Throughout the pertinent periods here involved National's business activities in California were substantial and continuous. Among such activities were the following:

(a) Charles P. Skouras continuously resided and maintained his office in California from 1932 until his death in 1954. From his office in California he carried out his duties and functions as one of the co-general managers of National until April, 1942, and thereafter as president and general manager. Charles P. Skouras was active in all phases of National's business activities throughout the country and carried out his functions as a manager of National's business as a matter of routine in his day to day activities. The performance of his duties and functions as an officer and director of National's subsidiaries in California were pursuant to and required by his contracts as a general manager of National. Such activities were performed mainly in California. Charles P. Skouras was an agent of National within the meaning of Section 4 of the Clayton Act.

(b) Spyros P. Skouras, the other co-general manager of National as well as president until November, 1934, and executive vice president until April, 1942, made frequent and extended business trips to California, from six to eight each year, from 1932 to 1942 to supervise, manage, and carry on National's business in the Far West and particularly in California in conjunction with his brother and

co-general manager Charles P. Skouras. When not in California, Spyros P. Skouras was in almost daily communication with Charles P. Skouras with respect to the affairs of National, not only in California but throughout the country.

(c) When in California, Spyros P. Skouras consulted and advised not only with Charles P. Skouras but with others who carried on National's business there. He visited and inspected theatre properties; carried on negotiations for the licensing of motion pictures; and held conferences with personnel employed directly by subsidiaries but who assisted in carrying on the business of National in California. He was accompanied from time to time by other officers of the company who also performed services for National in California. Film buyers usually accompanied Spyros P. Skouras on his trips to California and performed film buying activities there.

(d) J. J. Sullivan was the chief film buyer for National's West Coast subsidiaries. His film buying activities were under the supervision of Spyros P. Skouras. His activities in this respect were for theatres operated by subsidiaries of National in California and elsewhere. Mr. Sullivan at all times was a resident of California and maintained his office at 1609 W. Washington Boulevard in Los Angeles, but spent from four to six months each year in New York in the performance of his work. He signed an employment contract with Agency on December 5, 1935, and National guaranteed performance of the contract. Mr. Sullivan had refused to enter into the contract unless National guaranteed payment. The contract provided that notices should be sent to Mr. Sullivan at 1609 West Washington Boulevard, Los Angeles, California. The contract provided that expenses incurred by Mr. Sullivan outside of Los Angeles were to be reimbursed by Agency. If performance of the contract required Mr. Sullivan to spend more than six months of the year outside of Los Angeles, he had the right to terminate.

(e) John B. Bertero, a member of the California Bar, was employed by one of National's subsidiaries in October, 1930, and has continuously been employed in Los Angeles by one of such subsidiaries since that time. Continuously during all periods here involved he has resided in Los Angeles and has maintained his office at 1609 West Washington Boulevard in that city. Mr. Bertero and other attorneys directly employed by National's subsidiaries performed continuous services for National as a matter of routine, as well as when called upon to do so by one of the managers or officers of the company. Part of his function was to cooperate or work with Charles P. Skouras, National's manager. He continuously advised with Mr. Skouras in Los Angeles concerning various problems of National. Among the specific services performed by Mr. Bertero were work for National in Los Angeles in connection with bank loans made to National and its subsidiaries by The Chase National Bank in 1932; work with National's representatives in connection with the bankruptcy of Fox West Coast Theatres and of Pacific Northwest Theatres in 1933-1935; inspection of theatre properties in Montana and Wyoming when National considered realigning its theatre operating divisions about 1937; appearance for Fox West Coast Theatres Corporation and work with National's attorneys in the case of *Tally & Corbar* v. *Fox Film Corporation et al.* in the United States District Court in Los Angeles in 1935-1936; selecting and advising with attorneys who represented National in litigation in California; and, throughout the entire period, the day to day activities incident to his employment which involved or related directly to the business of National.

(f) National appeared and actively participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres, from February, 1933, to February, 1935, in the United States District Court for the Southern District of California in Los Angeles. National was one of the largest

creditors of the bankrupt, and because of the size and importance of its claims had a crew of men and representatives on the ground in California. Spyros P. Skouras and H. C. Cox, officers of National, were active in the proceedings in California. National purchased the assets of the bankrupt at the trustees' sale in Los Angeles on February 2, 1935. Funds for use in purchasing the assets were made available at the Security First National Bank of Los Angeles.

(g) In the action entitled *Tally & Corbar Corporation* v. *Fox Film Corporation et al.*, brought in the United States District Court in Los Angeles in 1935, National was named as a defendant together with Fox Film Corporation, one of its parents, and a number of its subsidiaries. The object of the suit was to set aside the Fox West Coast Theatres bankruptcy proceedings. National appeared in and defended the action. National was represented by attorneys from Los Angeles and San Francisco.

(h) National maintained its insurance department in Los Angeles continuously from 1930 to the time of the institution of these actions. The head of that department was Irving Epsteen, a resident, since at least 1930, of Los Angeles. Mr. Epsteen's office was at all times maintained at 1609 West Washington Boulevard in Los Angeles. Mr. Epsteen was on the payroll of Fox West Coast Service Corporation until 1935, of Fox West Coast Agency Corporation until 1942, and thereafter of Agency, all of which companies were direct or indirect wholly owned subsidiaries of National. During the entire period Mr. Epsteen has placed all the insurance on the properties of National and its subsidiaries, as well as all liability insurance. All negotiations for insurance took place in Los Angeles, California. The contract of December 2, 1935, between Agency and Fox West Coast Agency Corporation contained the following provision with respect to insurance:

> "(b) We (Agency) will advise you as to the placing and renewal of fire, liability and other insur-

ance for your Local, Serviced and Local Holding Companies and, if requested by you, will, to the extent authorized by such Companies, contract for such insurance either by individual policies on separate properties (or risks) or by blanket policies covering all or any part of the properties (or risks) of any one or more of the Operating Companies, Holding Companies or others."

(i) In the period between 1935 and 1939 National retained and paid attorneys in California who represented National and its subsidiaries or National's subsidiaries and the trustees in bankruptcy of Fox West Coast Theatres.

(j) National's agent, Agency, carried on extensive business activities for National and its subsidiaries in California from December, 1935, to the date these actions were filed. Such activities and services were supervisory, advisory and managerial, and were of the nature Agency had agreed to perform in its contracts of December 2, 1935, with National and with Fox West Coast Agency Corporation. In general they represented services and activities which, prior to 1935, had been performed directly by National, its officers and agents.

(k) In a contract dated December 2, 1935, between Agency and Fox West Coast Agency Corporation, Agency agreed to perform substantial services for Fox West Coast Agency Corporation and the other subsidiaries of National with which it had contracts. Included among such services for theatres in California and elsewhere were the buying and booking of motion picture films, advice with respect to and the placing of insurance, advice with respect to advertising and advertising policies, contract for repairs and the furnishing of supplies and equipment when requested and to render such special services as might be needed. The contract authorized Agency to enter into contracts for and on behalf of Fox West Coast Agency and the California subsidiaries serviced by it. Agency also agreed to furnish legal and auditing services to Fox West Coast Agency Cor-

poration and the companies serviced by it. National unconditionally guaranteed the payment by Fox West Coast Agency Corporation of its obligations to Agency under this contract.

(l) In the contracts between Fox West Coast Agency Corporation and the theatre operating subsidiaries of Fox West Coast Theatres Corporation it was provided that not only should services be rendered by Fox West Coast Agency Corporation but also by Agency. The contracts specifically provided that the services of Fox West Coast Agency should also include the services of Agency.

(m) While the separate corporate entities of National's subsidiaries were maintained, National, as sole stockholder, participated in the control and operations of its subsidiaries in California during all the periods of time here involved. Its general managers were officers of the more important subsidiaries. National arranged for and participated in the subsidiaries' financing. Its officers and agents engaged in business transactions for such subsidiaries. Such transactions involved contracts directly relating to the operation of theatres in California and elsewhere.

(n) The complaints herein affirmatively allege that National controlled and dominated its subsidiaries. The subsidiaries are alleged to have acted at the behest and instigation of National and the acts alleged to have been done by National are alleged to include those done by its subsidiaries.

14. When these actions were commenced in this court on September 5, 1951, the president and sole stockholder of each of the plaintiff corporations was one H. L. Gumbiner of Los Angeles, California. He verified the complaints in each of these actions, in which verification he declared that the allegations contained in the complaints were true. In said complaints it is alleged that the plaintiffs here, during all pertinent periods of time, were the owners and operators of the Los Angeles and Tower Theatres in Los Angeles.

15. On February 2, 1935, in the United States District Court for the Southern District of California, Central Division, H. L. Gumbiner commenced an action under the anti-trust laws of the United States against Fox Film Corporation (one of the parents of the defendant National), Fox West Coast Theatres Corporation and other subsidiaries of the defendant National, the bankrupt estate of National's subsidiary Fox West Coast Theatres and the trustees in bankruptcy of that company, one of National's general managers, Charles P. Skouras, and others.

15-A. In that case H. L. Gumbiner verified the complaint, wherein he was plaintiff, and alleged that he was the operator of the Tower and Los Angeles Theatres in Los Angeles, California, and that he owned the causes of action sued upon. The Tower and Los Angeles theatres in Los Angeles, California, are the same theatres that the plaintiffs herein alleged that they owned and operated. The causes of action herein asserted are essentially the same as those which H. L. Gumbiner individually asserted in 1935.

16. Though National was not specifically named as a defendant in that action, one of its parents, several of its subsidiaries and its co-general manager, Charles P. Skouras, were named as well as several "John Doe" defendants. Skouras was a defendant both individually and as a trustee in bankruptcy of National's wholly-owned subsidiary Fox West Coast Theatres.

16-A. In the complaint filed by Gumbiner it was alleged that Charles P. Skouras had "an office and place of business" in Los Angeles and that he was "the general manager of all of the businesses" of operating the theatres which are referred to in the complaint. Such businesses included the "business" and theatres in California in which National was interested and as to which National had contracted with Skouras to act as general manager.

17. National's Board of Directors directed that Alfred Wright, a Los Angeles lawyer, be retained to represent National's subsidiaries. Skouras individually, and the trustees in bankruptcy (whom National had agreed to indemnify against any such claims). Mr. Wright, under the retainer by National, appeared for and represented National's subsidiaries, the trustees in bankruptcy and Charles P. Skouras individually. Through this retention and representation National was in control of the litigation.

18. In addition to the sworn allegations in his complaint that H. L. Gumbiner was the owner and operator of the two theatres involved, and the owner of the causes of action now asserted by the plaintiffs here, Gumbiner held himself out to be the owner and operator of the Tower and Los Angeles theatres. Exhibits introduced at the trial show that H. L. Gumbiner advertised in the Los Angeles Times that the Los Angeles theatre was individually owned and independently operated by him. The Defendants in that case had cause to believe and were justified in believing that H. L. Gumbiner operated the Los Angeles and Tower Theatres and that the causes of action asserted with respect to such theatres were owned by him.

19. On the day that H. L. Gumbiner brought his individual action, namely, February 2, 1935, National was present in the same United States District Court in Los Angeles by its officers and attorneys and on that date purchased the assets of the bankrupt estate of Fox West Coast Theatres from the trustees in bankruptcy.

20. The action brought by H. L. Gumbiner, individually, was compromised and settled. A general release was executed by him and a stipulation of dismissal with prejudice was executed by him and his attorneys on June 3, 1935, and an order of dismissal was entered thereon. As part of the settlement a subsidiary of National leased the Tower

Theatre for ten years, effective in July, 1935, at a substantial yearly rental.

20-A. On June 3, 1935, the date when H. L. Gumbiner and his attorneys executed the stipulation of dismissal of the action brought by him individually, H. L. Gumbiner owned all of the stock of the present plaintiff, Gumbiner Theatrical Enterprises, and also owned all of the stock of the present plaintiff, Bertha Building Corporation. On that date H. L. Gumbiner was also the president of both of the present plaintiff corporations.

21. The institution of the present actions by H. L. Gumbiner's wholly-owned corporations, in which he verified each of the complaints is inconsistent with the action brought by H. L. Gumbiner in his own name in 1935, in which he also verified the complaint and asserted that he owned the causes of action sued upon. The representations made by him at that time were relied upon by National to its prejudice. Further, as to the lease which was entered into by a subsidiary of National, there was no evidence that any action was ever taken by H. L. Gumbiner or the plaintiff in this case, Bertha Building Corporation, to set aside the lease, nor was there any evidence that any action has ever been taken to set aside the release which he gave or the stipulation and order of dismissal with prejudice which he signed. The two plaintiffs here and H. L. Gumbiner, by their actions and failure to act, caused National to rely to its prejudice upon the validity and binding effect of the lease, the release and dismissal with prejudice of the claims asserted by H. L. Gumbiner.

22. The plaintiffs herein, the wholly-owned corporations of H. L. Gumbiner, were in privity with H. L. Gumbiner with respect to the causes of action asserted by him, and are bound by H. L. Gumbiner's acts and representations.

23. There was no evidence that the time of the settlement of the action brought by H. L. Gumbiner in 1935, at

which time he was the sole stockholder of both plaintiffs here, any reservation was made by him or by either of such corporations of any claim or cause of action against National or any of its subsidiaries.

24. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in an action filed in the Superior Court of the State of California in and for the County of Los Angeles on September 26, 1932, entitled *Jensen & von Herberg* v. *Wesco Corporation*. National, under its then name of Wesco Corporation, was named as a defendant in that case. It appears from those papers that on October 8, 1932, National made a motion to dismiss the complaint for improper venue and lack of jurisdiction. No decision with respect to that motion was ever rendered. Plaintiff voluntarily withdrew the action and subsequently refiled it, first in Delaware, and then in the Supreme Court of the State of New York, New York County, on January 4, 1934. There was no evidence that either plaintiff in these cases relied upon any position taken by National in the California proceedings. There was no evidence that plaintiffs ever knew of or were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Jensen & von Herberg* case.

25. In the period between October, 1932, and 1948 there is no evidence that National ever claimed or asserted in any judicial proceeding or otherwise that it was not subject to suit in California (except as described in finding 24). To the contrary, during that period, National appeared and actively participated in the bankruptcy proceedings of Fox West Coast Theatres in 1933-1935. It appeared and defended in the *Tally & Corbar* case in Los Angeles in 1935. It retained counsel and was in charge of the defense in the action instituted by Gumbiner in 1935.

26. Plaintiffs were also permitted to introduce in evidence certain pleadings in cases filed in California during the period from 1948 to 1951 in which National was named as a defendant. In each and all of those thirteen cases National appeared by counsel and filed its answer. In its answers National pleaded as a separate defense that venue and jurisdiction were improper as to it because, in effect it was not doing business in California. It was established by the evidence and the court finds that such defenses were pleaded in National's answers because of tax considerations. National did not wish to have on record a judicial admission that it was doing business in California which could be interpreted as an admission that its business there was of such nature as to subject it to California franchise taxes. Its subsidiaries were qualified to do business in California and paid taxes on the business done by them in California, and National maintained that its separate activities there did not constitute such business as to make it liable for additional taxes. No practical anti-trust or financial consequences attached to the assertion of these defenses by National. For in all of these thirteen cases either its parent corporation, Twentieth Century-Fox Film Corporation, or one or more of its most important subsidiaries, or both, were defendants.

27. In none of the thirteen cases was any decision ever rendered with respect to the defense set forth in the answers filed by National. In each instance, National, prior to taking any steps to litigate the issue raised by these defenses, determined to and did abandon the defenses. It was advised that in the opinion of its counsel, such a defense could not be sustained. Neither of the plaintiffs now before this court was a party to any of these thirteen cases. There was no evidence that either plaintiff at any time knew about or in any way relied upon any pleading or representation by National in those cases or that it was in any way deterred from filing a complaint against National in Cali-

fornia. No element of estoppel in favor of either plaintiff was created by the answers filed in any of the thirteen cases referred to above.

In view of other findings herein contained, the activities of National in California were such that the Statute of Limitations had run against the plaintiffs in California long before the pleadings in these thirteen actions were filed in 1948 and subsequent thereto.

28. The continuous and substantial business activities of National and its agents in California throughout the periods involved here, and particularly during the period between 1932 to July 20, 1938 (the date when the case of *United States* v. *Paramount* was filed), were such as to subject it to the jurisdiction and venue of the United States District Court in California under the venue provisions of the anti-trust laws during all of such periods. The presence and continuous business activities of National's wholly-owned subsidiaries in California, the presence and continuous activities of Charles P. Skouras as co-general manager of National, the frequent and extended business visits to California of Spyros P. Skouras, National's other co-general manager and President or Executive Vice President, and the business conducted by him there, the visits of other officers and film buyers to California to conduct business for National there, National's participation in the bankruptcy proceedings of its principal subsidiary, Fox West Coast Theatres, from 1933 to 1935, its retention of California counsel to represent its subsidiaries, the trustees in bankruptcy of Fox West Coast Theatres and Charles P. Skouras individually and its control over the activities in the litigation brought by H. L. Gumbiner in February, 1935, National's appearance in and defense of the case entitled *Tally & Corbar Corporation* v. *Fox Film Corporation, et al.*, in the California courts from 1935 to 1937, the retention and payment of attorneys for services in various cases in California, the location of its insurance department in Cali-

fornia, the business carried on in California for National by J. J. Sullivan, the performance of day to day and special services for National by John B. Bertero and others in California, and the substantial activities of Agency in California constituted the transaction of business there by National to the extent that it could have been sued in California for three years after the accrual of both causes of action asserted here and prior to the institution of the Paramount case. The claims of both plaintiffs herein are, therefore barred by the California statute of limitations.

29. National itself had not qualified to do business in California; paid no taxes to the State of California; owned no real estate in California; had no telephone or other office listing in California; had no employees in California, other than Charles P. Skouras, on its own payroll; paid no rent for any office space used by its officers and agents, and was the lessee of no real estate in California except that it was the guarantor of the lease to the Fox Theatre in San Diego, the sum total and nature of its other activities and those of its agents in California were such that had it been sued in California under the anti-trust laws at any time during the periods involved here, it could not have succeeded in establishing that venue in California was improper or that it was not subject to the jurisdiction of the Federal Courts in California.

30. Spyros P. Skouras as President and a co-general manager of National from February, 1932 to November, 1934, and as Executive Vice-President and a co-general manager from 1934 to April, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. His office was also maintained at that address from 1942-1952, during which time he was Chairman of the Board of Directors of National. During all of these periods Mr. Skouras was also a director of National, and resided in New York.

31. Sidney R. Kent, President of National from November 14, 1934 to March, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. During that period Mr. Kent resided in New York and was also a director of National. Other officers and directors of National continuously maintained their offices and residences in New York.

32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i.e., from December 5, 1934, to January 3, 1936.

33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y. in space rented from Twentieth Century-Fox. All officers of Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the payroll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

35. In the period between 1932 and 1942 one of Spyros P. Skouras' principal duties was acting as the head of National's film buying department in New York. He and his

assistants regularly negotiated for and entered into film licensing agreements with motion picture distributing companies in New York. Such contracts were entered into for the five or six hundred theatres operated by National's operating and agency subsidiaries. Mr. Skouras negotiated and executed such contracts as agent of the subsidiaries.

36. From 1930 throughout the period here involved, National retained and paid attorneys at law to represent it generally and specially in New York. Its general counsel was a New York firm.

37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $19,350,000 from The Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with the bank in order to borrow money. As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent. of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's

indebtedness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

42. National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century-Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation." Prior to 1935 it had used the telephone facilities of Twentieth Century-Fox without a listing and all calls came in through the Twentieth Century-Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century-Fox.

44. National maintained an office at 26 Journal Square, Jersey City, New Jersey, from January 1, 1935, to June, 1936. At that office were located, for a year and a half, its bookkeeping and accounting department, consisting of seven or eight people, and two officers. During that period the chief operating executives of the company maintained their offices in New York. The opening of the office in New Jersey came about because of tax considerations. Neither Mr.

Skouras nor Mr. Kent ever had an office in New Jersey. The personnel of the New Jersey office were required to come to New York to advise and consult with Mr. Skouras and Mr. Kent.

45. The Jersey City office, at which was located National's accounting and bookkeeping departments, was closed in June, 1936. Meetings of National's Board of Directors were held for a brief time at that office but after December, 1936, Board meetings in New Jersey were held in the office of the manager of the State Theatre in Jersey City. National had no employees located in Jersey City after June, 1936. Soon after Twentieth Century-Fox re-acquired the Chase National Bank's interest in National and again became the sole stockholder, corporate meetings were again held in New York.

46. The business activities of National in New York throughout the period from 1930 to the date these actions were filed were substantial and continuous. Even during the period when it maintained an office in New Jersey, its main office must be held to have been in New York where its President, Executive Vice-President and other officers were located and where they carried out their functions and duties as officers of the company. The fact that this Jersey City office was sometimes referred to as National's "principal office" or "principal place of business" does not alter the actual facts as to the existence of its office and that of its executives in New York. Throughout the period that the Jersey City office was maintained, National's Board of Directors and Executive Committee met in New York. After June, 1936, National's only activities in New Jersey were the holding of meetings of its Board of Directors in Jersey City until January, 1944.

47. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in *Hudside Amusement Company* v. *Warner Bros. Pictures Inc., et al.*, an action filed in the United States District Court for the Southern District

of New York in February, 1941. National was named as a defendant in that action. It appears from those papers that in March, 1941, National made a motion to dismiss (in the form of an order to show cause) for improper venue and lack of jurisdiction. It was established by the evidence and the court finds that such motion was filed because of tax considerations. No decision with respect to that motion was ever rendered. Upon advice of counsel the venue in New York was proper as to it and that it could not successfully contest the jurisdiction, National withdrew the motion and entered a general appearance. An order was entered dismissing the motion and noting that National had filed a general appearance. National subsequently answered and defended the action.

48. Neither of the plaintiffs in these cases was a party to the *Hillside* case. There was no evidence that any position taken or pleading filed by National in that case was known to or relied upon by either plaintiff in these cases. There was no evidence that plaintiffs were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Hillside* case. Furthermore, in view of the findings herein made, the activities of National in New York were such that the Statute of Limitations of New York had run against the plaintiff Gumbiner Theatrical Enterprises prior to the filing by National of any papers in the *Hillside* case.

49. There was no evidence that prior to the filing of its motion in the *Hillside* case in 1941, National had ever filed any pleadings or had made any statements or had taken any position to the effect that it was not subject to the jurisdiction of the courts of New York or that it was not amenable to suit in New York. To the contrary, in 1934, in an action entitled *Palmer v. Wesco Corporation*, it had been sued in New York in the Supreme Court, New York

County, appeared in the action, defended and eventually settled the case.

50. The court finds that the continuous and substantial business activities of National in New York throughout the periods here involved constituted the transaction of business by National in New York and subjected it to the jurisdiction and venue of the United States District Court in New York within the meaning of the anti-trust laws. With particular reference to the period from 1930 to July 20, 1938, the date when the *Paramount* case was filed, a period of more than six years after the accrual of the cause of action asserted by Gumbiner Theatrical Enterprises, National transacted business in New York and had agents there within the meaning of the venue provisions of the anti-trust laws. The court finds that the presence, continuous activities and maintenance of offices in New York by National's chief executives, Spyros P. Skouras and Sidney R. Kent, and also by Mr. Skouras as a co-general manager of National; the presence, activities and maintenance of offices in New York by other officers of National; the meetings of National's Board of Directors and Executive Committee in New York; the retention of attorneys to represent it generally and specially; the maintenance of bank accounts; the substantial loan transactions effected by National and its guarantees of loans to its subsidiaries; the entering into of various contracts in New York; the film buying activities by National on behalf of its subsidiaries; the receipt and payment of dividends in New York; the presence of its parent corporations in New York; and the substantial and continuous business activities of its agent, Agency, in New York constituted transacting business by National during that particular six-year period prior to the institution of the *Paramount* case. The court finds that National could have been sued in New York during that period and that the claim of the plaintiff Gumbiner Theatrical Enterprises is barred by the New York Statute of Limitations. The

Court further finds that National's activities in New York were such that it could have been sued in New York, under the anti-trust laws, continuously throughout the period here involved.

Conclusions of Law

1. The Statute of Limitations of California, where the alleged causes of action arose, is three years. California Code of Civil Procedure, Section 338-1.

2. Plaintiffs and defendant concede for the purposes of these cases, and the court concludes that the Statute of Limitations of New York, where these actions were instituted, is six years. Civil Practice Act of the State of New York, Section 48.

3. By virtue of Section 13 of the Civil Practice Act of the State of New York, the Statute of Limitations of the State of California, where the alleged causes arose, is applicable if defendant could have been sued in that state.

4. If the defendant was amenable to suit in California during the pertinent periods involved here, the California statute applies. If the causes of action are barred in California, they are barred in New York by Section 13 of the Civil Practice Act.

5. The cause of action alleged in the *Gumbiner Theatrical* case accrued in California on December 8, 1931. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the *Paramount* case. If National could have been sued in New York in an anti-trust case for any period of six years prior to July 20, 1938, the action would also be barred by

the New York Statute of Limitations, regardless of whether barred in California, and regardless of any tolling effect of the *Paramount* case.

6. The cause of action alleged in the *Bertha Building* case accrued in California on July 4, 1935. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the *Paramount* case.

7. Spyros P. Skouras was an agent of National in New York during the period from 1932-1942, within the meaning of Section 4 of the Clayton Act.

8. Charles P. Skouras was an agent of National in California during all of the periods of time here involved, within the meaning of Section 4 of the Clayton Act.

9. National Agency Corporation was an agent of National in New York after its organization in 1935, within the meaning of Section 4 of the Clayton Act.

10. Throughout all the periods of time here involved, National had one or more officers in New York upon whom service of process could have been made within the meaning of Section 19 of the Civil Practice Act of the State of New York. Section 19 did not operate to toll the New York Statute of Limitations. Defendant, moreover, was amenable to suit in New York under the venue sections of the anti-trust laws, which are the controlling venue statutes involved here.

11. The pleadings and affidavits filed by National in other cases to which plaintiffs were not parties, and which on their face were inconsistent with defendant's position here, are not conclusive upon defendant but were open to explanation and rebuttal.

12. No element of estoppel operated in these cases in favor of plaintiffs to preclude defendant from offering evi-

dence with respect to its business activities in California and New York.

13. National, within the meaning of the venue provisions of the anti-trust laws, transacted business and had agents in California for three years after the causes of action in both cases arose and could have been sued there. Both causes of action were, therefore, barred by the California three year Statute of Limitations prior to July 20, 1938.

14. The complaints must, therefore, be dismissed.

/s/ CLARENCE G. GALSTON
U. S. D. J.

Affidavit of John P. Edmondson

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-77

HILLSIDE AMUSEMENT COMPANY,

Plaintiff,

against

WARNER BROS. PICTURES, INC., et al.,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN P. EDMONDSON, being duly sworn, deposes and says:

1. I am Secretary of National Theatres Corporation.

2. I am authorized by National Theatres Corporation to make this affidavit on its behalf in support of its order to show cause why the complaint should not be dismissed and the purported service of a summons and complaint quashed as to it.

3. I am familiar with the facts herein.

4. On February 25, 1941, a Deputy United States Marshal for the Southern District of New York attempted service of a summons and complaint in the above entitled action upon me at 444 West 56th Street, New York, N. Y., by leaving with me a copy of the complaint, together with the summons.

5. National Theatres Corporation is a Delaware corporation. Its principal place or business is 2854 Hudson Boulevard, Jersey City, New Jersey. National Theatres Corporation does not maintain an office in the territorial jurisdiction of the Southern District of New York. National Theatres Corporation is a holding company. It engages in no business other than holding stock and other securities. All securities owned by it are kept in vaults in Jersey City, New Jersey. It maintains an office in Jersey City, New Jersey, at which all directors' meetings, stockholders' meetings and meetings of the auditing committee are held. Its stock record books are kept in Jersey City, New Jersey.

6. I have an office at 444 West 56th Street, New York, N. Y., where the summons and complaint were purportedly served upon me. That office is not the office of National Theatres Corporation. National Theatres Corporation does not own the building and it does not pay the rent. The office is maintained by Twentieth Century-Fox Film Corporation, of which I am an assistant secretary. I transact no business for National Theatres Corporation in the Southern District of New York.

7. None of the officers, directors, or employees of National Theatres Corporation maintains an office as an officer, director or employee of National Theatres Corporation in the Southern District of New York. None of the officers, directors or employees of National Theatres Corporation transacts any business on behalf of National Theatres Corporation in the Southern District of New York.

8. National Theatres Corporation is not qualified to do business in the State of New York.

9. National Theatres Corporation does not maintain an office of any sort in New York, N. Y., or anywhere else within the territorial jurisdiction of the District Court of the United States for the Southern District of New York. At all times since December 29, 1934, the principal office

of National Theatres Corporation has been in Jersey City, New Jersey. No meetings of stockholders, directors, or of the auditing committee are held in the Southern District of New York.

10. National Theatres Corporation is not engaged in the exhibition of motion pictures. It does not engage in the business of buying or selling any commodity. It does not enter into license agreements for the exhibition of motion pictures in the Southern District of New York or anywhere else.

11. While National Theatres Corporation is a holding company, it owns no interest, directly or indirectly, in any theatre within the territorial jurisdiction of the District Court of the United States for the Southern District of New York.

12. I have consulted the General Counsel for National Theatres Corporation, Messrs. Dwight, Harris, Koegel & Caskey, No. 100 Broadway, New York, N. Y. and have been advised by them that in their opinion National Theatres Corporation does not transact business within the territorial jurisdiction of the District Court of the United States for the Southern District of New York; and that it is not an inhabitant nor can it be found within the territorial jurisdiction of said court.

WHEREFORE I respectfully pray that the purported service of summons and complaint in the above entitled action upon National Theatres Corporation be quashed and that the complaint be dismissed as to National Theatres Corporation.

JOHN P. EDMONDSON

(Sworn to March 13, 1941.)

Affidavit of William W. Owens

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 13-77

HILLSIDE AMUSEMENT COMPANY,

Plaintiff,

against

WARNER BROS. PICTURES, INC., *et al.*,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM W. OWENS, being duly sworn, deposes and says:

I am a member of the firm of Dwight, Harris, Koegel & Caskey, attorneys for National Theatres Amusement Corporation, which appears specially herein for the purpose of contesting the jurisdiction of the Court. This affidavit is in reply to the affidavit of Norman H. Samuelson, Esq., sworn to June 14, 1941.

Mr. Samuelson says that from information in his possession he is convinced that the principal office of National Theatres Corporation was, until a date after service of the summons and complaint herein, located at 444 West 56th Street, New York City. He does not state the source or nature of his information. My firm have represented National Theatres Corporation since June 10, 1937. I state of my own knowledge that National Theatres Corporation has not at any time since June 10, 1937 down to the date of this affidavit had an office or place of business at 444 West

56th Street or anywhere else within the Southern District of New York.

Mr. Samuelson also says that he is informed that National Theatres Corporation, through affiliated and associated companies, has interests in theatres which operate within the territorial limits of this Court. Again he does not state the source or nature of his information. I state of my own knowledge that neither National Theatres Corporation nor any subsidiary or sub-subsidiary has had any interest in any theatre within the Southern District of New York since June 10, 1937 and I know of no interest which it ever had in any such theatre before that date. With the exception of a few theatres in Illinois, Wisconsin and Michigan, all theatres operated by the subsidiaries and affiliates of National Theatres Corporation are west of the Mississippi River. It has a wholly owned subsidiary which owns a theatre in Philadelphia but that theatre has been leased to independent interests for the past five years.

At the hearing I asked Mr. Samuelson to name any theatre in the Southern District of New York in which he thought National Theatres Corporation or any of its subsidiaries or affiliates had an interest. He named the Roxy theatre in New York City. I state from my own knowledge that neither National Theatres Corporation nor its subsidiaries has ever had any interest in the Roxy theatre or has had anything to do with the ownership or management thereof.

From the above it is not only apparent that National Theatres Corporation is not subject to the jurisdiction of this Court but it is also apparent that plaintiff, which operates in the State of New Jersey, cannot possibly have any grievance against National Theatres Corporation inasmuch as it operates no theatres and the nearest theatre operated by any of its subsidiaries is in Detroit, Michigan.

On May 5 the plaintiff procured an order from Judge Mandelbaum granting it leave to examine the various defendants regardless of the fact that none had yet an-

swered. In his affidavit in support of that application Mr. Samuelson said that all defendants except National Theatres Corporation had appeared generally. With respect to National Theatres Corporation he said the following:

> "With particular reference to defendant National Theatres Corporation, this defendant challenges the jurisdiction of the Court over its person by reason of the fact that it alleges that it is not doing business within the Southern District of New York nor that it can be found here. An examination of its agents and representatives is essential so that evidence may be procured out of the mouths of its own agents to contradict its affidavits and to sustain the jurisdiction of this Court."

At the hearing on the present motion the Court inquired of Mr. Samuelson whether he had been stayed from proceeding to examine defendant under Judge Mandelbaum's order of May 5th and Mr. Samuelson told the Court that he had been stayed. That is not so. No effort has ever been made to examine National Theatres Corporation pursuant to Judge Mandelbaum's order and National Theatres Corporation has never made any effort to stay such an examination. The brief which Mr. Samuelson filed with the Court on the present motion bears me out. In referring to Judge Mandelbaum's order of May 5 Mr. Samuelson's brief says at page 3:

> "Although other defendants have challenged the aforesaid order, which is treated in a separate memorandum on their motions to vacate said order, this defendant has made no motion with reference thereto. Apparently the right of the plaintiff to take oral testimony in support of the jurisdiction of this court over the person of said defendant, is conceded."

In summary the papers on the present motion were served on March 15. The plaintiff has had sixteen weeks

to seek evidence to disprove our contention that National Theatres Corporation cannot be found within this district. The fact that it has not put any such evidence before the Court makes it apparent that it has found none. The plaintiff now asks the Court to give it an opportunity to take depositions on the subject. But it has had that opportunity for more than two months and has done nothing about it.

It is respectfully submitted that plaintiff has had ample time to make its investigation and that the motion to vacate the service of the summons should now be granted.

WILLIAM W. OWENS.

(Sworn to July 9, 1941.)

Affidavit of H. C. Cox

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 13-77

HILLSIDE AMUSEMENT COMPANY,

Plaintiff,

against

WARNER BROS. PICTURES, INC., *et al.*,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

H. C. Cox, being duly sworn, deposes and says:

I am the Treasurer of National Theatres Corporation. I have read the affidavit of John P. Edmondson sworn to on March 13, 1941 and the affidavit of William W. Owens sworn to on July 9, 1941, both in support of the motion to vacate the service of the summons on National Theatres Corporation in the above entitled action. The statements contained in those affidavits are true to my knowledge.

I have also read the opposing affidavit of Norman H. Samuelson sworn to on June 14, 1941 and in answer to paragraph 6 of that affidavit I state of my own knowledge that National Theatres Corporation has never entered into any license agreements for motion pictures either within the Southern District of New York or at any other place.

H. C. Cox.

(Sworn to July 9, 1941.)

Plaintiffs' Exhibit 31

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 12073

GUMBINER THEATRICAL ENTERPRISES, INC.,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

Civil Action No. 12074

BERTHA BUILDING CORPORATION,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

Attached are extracts from papers on file in the United States District Court for the Southern District of New York in a case entitled *United States* v. *Paramount, et al.*, Equity No. 87-273, in evidence pursuant to colloquy between Court and counsel, appearing at R. 556-558:

Petition filed July 20, 1938, page 18, paragraph (7)(e):

"National Theatres Corporation, 42% of the capital stock of which is owned and controlled by Twentieth Century-Fox Film Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 444 West

56th Street, New York, New York, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation."

Answer of National Theatres Corporation dated June 29, 1939, page 2, paragraph 4(b):

"Answering paragraph '7(e)' of the petition, deny that National Theatres Corporation (herein sometimes called 'National') is a holding company for the theatre interests of Fox, or that National has a place of business at 444 West 56th Street, New York, N. Y., and aver that its place of business is at 2854 Hudson Boulevard, Jersey City, New Jersey."

Upon the last page of said answer, page 16, there appears:

"DWIGHT, HARRIS, KOEGEL & CASKEY,
Solicitors for Defendants:
National Theatres Corporation,
Spyros P. Skouras,
A. S. Gambee,
H. C. Cox and
John P. Edmondson.
Office and P. O. Address,
100 Broadway,
Borough of Manhattan,
New York City.

June 29, 1939.

JOHN F. CASKEY,
A member of said firm."

Office - Supreme Court, U.S.
FILED
APR 17 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 840

GUMBINER THEATRICAL ENTERPRISES, INC., *Petitioner*,

v.

NATIONAL THEATRES CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF OF PETITIONER

BORIS KOSTELANETZ
52 Wall Street
New York, N. Y.
Attorney for Petitioner.

Of Counsel:

JAMES M. LANDIS,
NICK C. SPANOS,
EUGENE GRESSMAN.

IN THE

Supreme Court of the United States

October Term, 1957

No. 840

GUMBINER THEATRICAL ENTERPRISES, INC., *Petitioner,*

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---

REPLY BRIEF OF PETITIONER

In reply to respondent's brief in opposition to the petition for a writ of certiorari, petitioner makes the following observations:

1. In the first two numbered points in its brief, respondent seeks to reshape the issue of the tolling of the New York limitations statute into one of jurisdiction and venue under the federal antitrust laws. Respondent consistently and erroneously assumes that it was

enough to toll the statute in New York "if it could have been sued there" under the antitrust laws. Nothing could be further from the legal truth.

As was said in *Talmadge* v. *United States Shipping Board*, 54 F. 2d 240, 246 (C.A. 2, 1932), "While it is tempting, when one is dealing with a statute of limitations, to construe the words as including any activity which gives the plaintiff an opportunity to sue, we must have more in mind." We must, in other words, have in mind the statutory fact that under the New York statute of limitations in effect during the relevant period, at least two elements were necessary to toll the statute as to respondent: (1) one or more corporate officers had to be present continuously in the state throughout the six-year period, and (2) the corporation had to be doing or transacting business continuously in New York during that period so as to make service in New York upon the officer then physically present in New York valid service on the corporation. These two elements, of course, have no relation to jurisdiction or venue under the Sherman or Clayton Acts. Nor is there any indication that the New York legislature ever adopted the jurisdiction or venue provisions of those federal statutes in establishing its own statute of limitations.

2. Respondent's basic misconception and distortion are reflected and refuted in its own brief. All the effort in that brief to demonstrate from the record that respondent's officers were in fact continuously in New York for purposes of the limitations statute would be irrelevant if in truth the case turned solely on the jurisdiction and venue provisions of the federal antitrust laws.

The respondent must be aware of this inconsistency. The relevant version of Subsection 2 of Section 19 of the New York Civil Practice Act was the version in effect during the critical years of 1932 to 1938. The respondent, however, has misquoted that version by inserting the words "or other persons" after the word "officers", thus making the relevant tolling statute appear more consistent with respondent's attempt to reshape the limitations issue into one of jurisdiction and venue. But the words "or other persons" were not added until 1943, long after the period relevant to this case, as respondent well knows. Under the pertinent version of the New York tolling statute, quoted correctly on pages 3 and 4 of the petition, it is crystal clear that only by the physical presence of *officers* in New York throughout the six-year period of limitations could a foreign corporation like the respondent avoid the tolling effect of Section 19.

3. Respondent has in no way refuted petitioner's main contention that it is entitled as of right to a jury trial on contested factual issues growing out of the limitations plea. That right, as demonstrated in the petition, cannot legitimately be diluted by reliance by an appellate court upon findings growing out of highly contradictory and conflicting facts. That such is the nature of the findings in question is glaringly apparent. As to nine of the ten findings relied upon by the Court of Appeals and demonstrated by the petitioner to be grounded upon disputed evidence, respondent makes no response or comment. And as to the one finding discussed by respondent (Finding No. 33), respondent's position is unsupported by the record (R. 233a) and serves only to emphasize anew the disputed nature of these findings.

4. Respondent has attempted to defend the unwarranted finding implicit in the decision of the Court of Appeals on rehearing that respondent's officers were physically present in New York *continuously* for the six-year period required by the New York statute of limitations. That attempt exposes the invalidity not only of the finding itself but of respondent's entire position.

Respondent, of course, can cite no evidence in the record to support a finding of continuous physical presence. It therefore has to resort to Findings Nos. 30 and 31 of the District Court, not mentioned by the Court of Appeals, to the effect that respondent's officers continuously maintained "their offices and residences" in New York. But it is elementary that service on a corporation cannot be achieved by substituted service upon the office or residence of one of its officers; the officer himself must be physically served. Thus findings that respondent's officers continuously maintained their offices and/or homes in New York are inadequate to support the unwarranted finding of the Court of Appeals that *the officers themselves* were present continuously in New York for six years.

Respondent's desperate attempt to shore up this unfounded finding of the Court of Appeals also exposes afresh the invalidity of respondent's basic premise that the limitations issue was solely one of jurisdiction and venue under the antitrust laws. The continuous physical presence of officers in a jurisdiction for a period of six years, or for any other stated period, has not in any decided case been critical to the presence or absence of juris-

diction under the Sherman or Clayton Acts; nor has such presence been considered decisive in determining venue under those statutes.

5. As to whether the decision below is in conflict with applicable decisions relating to the doctrine of preclusion against inconsistent judicial declarations by a litigant, respondent's only answer is to deny the very existence of the doctrine notwithstanding this Court's express recognition and application of it.

Respondent's denial of the doctrine is premised on its confusion of the rule with that of estoppel. The elements ordinarily necessary to the application of the estoppel doctrine are not present in this case, as respondent notes. But they were similarly absent in all the cases cited in the petition where the doctrine of preclusion was recognized and applied. The application of the preclusion doctrine, in other words, is not dependent upon the elements essential to estoppel.

Thus in *Sturm* v. *Boker,* 150 U.S. 321 (1893), where the estoppel elements were not present, the application of the preclusion doctrine was held to turn upon entirely different considerations. This Court there pointed out that while it did not "controvert the soundness of this general rule"—i.e., of preclusion—"the question here is whether the statements made by the complainant in the insurance suits bring him within the operation of this wholesome rule? We think not, for it would be pressing his language too far to hold that he made any positive statement to the effect that he was the absolute owner of the goods or that he admitted as a matter of fact rather than of opinion that he was responsible for their loss." 150 U.S. at 334.

Moreover, this Court in a lengthy footnote set out in full the testimony at the prior trial which was claimed to be the basis for the application of the preclusion doctrine. 150 U.S. at 335. Both that footnote and the Court's detailed analysis showing that there was no inconsistency in the statement would have been meaningless and superfluous if, as respondent contends, the doctrine of preclusion does not exist. It would then have been necessary only to note that the elements of estoppel were not present.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, a writ of certiorari should issue so that the judgment of the court below may be reviewed.

Respectfully submitted,

BORIS KOSTELANETZ
52 Wall Street
New York, N. Y.
Attorney for Petitioner.

Of Counsel:

JAMES M. LANDIS,
NICK C. SPANOS,
EUGENE GRESSMAN.

April 17, 1958

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APR 3 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 840

GUMBINER THEATRICAL ENTERPRISES, INC.,
Petitioner,

v.

NATIONAL THEATRES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

FREDERICK W. R. PRIDE
Attorney for Respondent
National Theatres Corporation
100 Broadway
New York 5, New York

JOHN F. CASKEY,
Of Counsel.

April 3, 1958.

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IN THE

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No. 840

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The original opinion of the Court of Appeals (Judge Learned Hand dissenting) and the opinion on re-hearing are reported in 248 F. (2d) 833. The opinion of the District Court is reported in 140 F. Supp. 909. The findings of fact and conclusions of law of the District Court are not reported but are annexed to the petition as an appendix. The opinion of the District Court directing that the statute of limitations issue be tried to the court without a jury and the order of dismissal are not reported. Both are printed in the appendix to the petition for certiorari in *National Theatres Corporation* v. *Bertha Building Corporation*, Docket No. 761, October Term, 1957.*

*All of the stock of the petitioner here and the respondent Bertha Building Corporation in No. 761 was owned by one H. L. Gumbiner. The complaints in the two actions were filed on the same day and the

Jurisdiction

The judgment sought to be reviewed was entered on November 7, 1957. Petitioner's motion for a re-hearing was denied on December 6, 1957. The jurisdiction of this Court is invoked pursuant to the provisions of Section 1254(1) of Title 28, United States Code.

The Questions Presented

Except that respondent does not agree with the holding of the court below that petitioner was entitled to a jury trial of the jurisdiction and venue issues presented by its statute of limitations defense, the decision sought to be reviewed was correct. It is not in conflict with any decision of this Court or with any decision of any other court of appeal. Under

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actions were consolidated for the trial of defendant's statute of limitations defense. The respondent here is the petitioner in No. 761 and it was the only defendant in each case, the statute of limitations being an admitted bar as to all the alleged co-conspirators. The issues tried below were whether National Theatres Corporation could have been sued in California for three years or in New York for six years after the causes of action accrued. The District Court dismissed both complaints as barred by the three year California statute. It also held that the complaint of petitioner Gumbiner Theatrical Enterprises was barred by the six-year New York statute and should be dismissed for that reason as well. Plaintiffs in both cases appealed to the court below and the appeals were heard together on one record. In its original decision, the Court of Appeals held that plaintiffs were entitled to a jury trial of the jurisdiction and venue issues raised by the California statute of limitations defense and reversed the judgments and remanded the cases for a new trial. On defendant-appellee's petition for a re-hearing, the court below amended its original decision and affirmed the judgment of the District Court dismissing the Gumbiner Theatrical complaint as barred by the New York statute of limitations. It is from that judgment that petitioner here seeks a review by this Court. The court below adhered to its original decision in the Bertha Building case, holding that plaintiff was entitled to a jury trial of the issues raised by the California statute of limitations defense and the defendant-appellee in that case (respondent here) duly filed its petition for certiorari. The record on that petition, Docket No. 761, contains the printed appendices and the proceedings below. Reference is made to that record in this brief

the circumstances the only questions which could be raised by this petition appear to be as follows:

1. Was it error for the court below to affirm the judgment dismissing the complaint as barred where the District Court would have been required to direct a verdict in defendant's favor if the trial of the jurisdiction and venue issues raised by the statute of limitations defense had been held to the court and jury?

2. Did the court below correctly hold that respondent both directly and through its agents transacted business in New York?

3. Absent any element of estoppel, was respondent precluded from showing its actual business activities in New York?

The Statutes Involved

The pertinent statutes involved are Sections 4 and 12 of the Clayton Act (38 Stat. 731, 736; 15 U. S. C. §§ 15, 22) and Section 19 of the New York Civil Practice Act, the texts of which are set out as an appendix to this brief.

Statement

Much of the material pertinent to respondent's statement has been set forth in its own petition in *National Theatres Corporation* v. *Bertha Building Corporation*, No. 761 now pending before this Court. Since it appears that the petition in that case will be circulated at the same time as this petition, respondent respectfully refers this Court to its statement there and will not repeat matters contained therein, except to the extent necessary for an understanding of the issues involved on this petition.

Petitioner commenced its action against respondent under the anti-trust laws in the Eastern District of New York on September 5, 1951. The complaint alleged that petitioner was injured in its property and business of operating the Los

Angeles theatre in Los Angeles, California, prior to December 8, 1931. It is conceded that petitioner's cause of action accrued in California no later than that date. It is also conceded that if respondent could have been sued in New York for six years after December 8, 1931, or in California for three years, petitioner's claim is barred. This action was commenced against respondent nearly twenty years later. Respondent is the only defendant.

A separate trial of respondent's statute of limitations defense was held on December 12-16, 1955. On March 28, 1956, District Judge Galston rendered his decision in which he held that respondent had been amenable to suit both in California and New York throughout the period from December 8, 1931, to July 20, 1938, and dismissed the complaint as barred by the statutes of limitations of both states.

In its statement of the case petitioner is plainly in error when it asserts (Pet. 9) that the District Court did not consider respondent's business activities in New York and did not hold that petitioner's claim was barred in New York. Building upon that false premise, petitioner mis-states the proceedings below when it asserts (Pet. 11-13) that the court below made its own insupportable and unwarranted findings with respect to respondent's business activities in New York. For the District Court unequivocally held that petitioner's claim was barred in New York and made extensive findings and conclusions to that effect. After holding that the claims in both this case and the companion *Bertha Building* case, No. 761, were barred by the California three-year statute, the District Court stated that it was unnecessary to discuss, in its opinion, the bar of the New York statute. It noted that its findings were sufficient for that purpose, saying (Pet. 34a):

> "Nor is it necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during

> the critical years. It is sufficient for that purpose to refer to the findings which will be filed concurrently with this opinion. They are necessarily multiple because of the voluminous record."

The District Court then concluded its opinion with the express statement that the action was barred in New York (Pet. 35a):

> "Defendant was amenable to suits in both California and New York, and they should be precluded from maintaining actions sixteen and twenty years respectively after the alleged causes of action accrued. The complaints are dismissed."

This conclusion is reflected in the District Court's findings. Finding 50, which summarizes respondent's various and substantial activities in New York, concludes as follows (Pet. 59-60a):

> "The court finds that National could have been sued in New York during that period and that the claim of the plaintiff Gumbiner Theatrical Enterprises is barred by the New York Statute of Limitations. The Court further finds that National's activities in New York were such that it could have been sued in New York, under the anti-trust laws, continuously throughout the period here involved."

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Even If the Jurisdiction and Venue Issues Raised By Respondent's Statute of Limitations Defense Had Been Tried to a Jury, the District Court Would Have Been Required to Direct a Verdict in Respondent's Favor.

The basic error in the decision of the court below was its holding that the petitioner here and the respondent Bertha Building Corporation, in *National Theatres Corporation* v. *Bertha Building Corporation*, No. 761, were entitled to a jury trial of the jurisdiction and venue defenses raised by the

statute of limitations defenses in both cases. This error of law is a vital point in the petition for certiorari in No. 761 and is fully treated there. If that issue is determined in favor of petitioner in No. 761, such decision would, of course, be decisive of the issues raised by the petition here. We are directly concerned here only with petitioner's contention that the Court of Appeals erred in affirming the judgment of the District Court.

Petitioner having prevailed on the important question of law which is at issue in No. 761 thus comes here on what are essentially questions of fact and the three questions which it poses for consideration by this Court cannot be disguised as anything else. The net effect of petitioner's contentions is a demand that this Court examine the entire record to determine whether some factual finding made against petitioner might have been made upon disputed evidence. That, we submit, is not the function of this Court. But if it were it would be incumbent upon petitioner fairly and accurately to present the matter. That it has not done.

Petitioner unjustifiably attacks the court below and asserts that it assumed judicial powers it did not possess. It contends that the court below "made unwarranted findings of its own" (Pet. 13), made findings "unsupported by any finding of the District Court or by any ascertainable evidence" (Pet. 11) and that it "fashioned its own finding, unsupported in any way" (Pet. 20). The court below did no such thing. In its original opinion the Court of Appeals, while holding that the findings of the District Court were not clearly erroneous (Pet. 3a), directed its attention solely to the issues raised by the California statute of limitations defense and did not consider the effect of the New York statute of limitations. On the rehearing, it did consider the findings and the evidence in support thereof with particular regard to whether the action was barred in New York. Only then did it affirm the judgment of dismissal, noting that it had done so after "a careful review of

the evidence" (Pet. 18a). It held, moreover, that "the documentary evidence recited in Judge Galston's findings was overwhelming" and that regardless of what standard was applied "it is irrefutable that National was amenable to process in New York during the relevant period" (Pet. 18-19a). It then decided that if there had been a jury trial the District Court "would have been required to set aside a plaintiff's verdict on this issue" (Pet. 18a).

On the re-hearing, therefore, the court below reached the same conclusion when it considered respondent's activities in New York that Judge Learned Hand had reached when the case was heard originally. In his dissent Judge Hand had said, with respect to all the evidence (Pet. 8a):

> "However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Rayfiel's error is immaterial."

The specific findings set out in the opinion of the court below on the re-hearing, and which are now criticized by petitioner, not only were fully and completely supported by the record but there was no disputed evidence with respect to them. As the court noted, those findings relating to respondent's business activities in New York "were based solely on a stipulation and on evidence corroborated by documentary evidence" (Pet. 19a). Petitioner's comments in the parallel columns of its petition (Pet. 15-18) are either misleading and inaccurate or are irrelevant. For example, petitioner assails Finding 33 as based on disputed facts by asserting that respondent's agent, National Agency, gave up its New York office and moved to California in 1942 (Pet. 15-16). That assertion, if relevant,* is a mis-statement of the record. Agency did open an office in California in 1942 but only its treasurer and its accounting department moved there (Appellant's Ap-

*The relevant period was from December 8, 1931, to July 20, 1938.

pendix, 144a, 233a and Appellee's Appendix, 21-22a in No. 761). In fact, Agency, from shortly after its incorporation up to the time this action was instituted, continuously maintained an office in New York and performed substantial services for respondent there (Findings 33, 34, Pet. 54a).

Petitioner particularly criticizes the holding of the court below that "National did have officers in the state" (Pet. 14, 20) within the meaning of Section 19 of the New York Civil Practice Act, claiming that in this respect the Court of Appeals "fashioned its own finding, unsupported in any way" (Pet. 20). Petitioner further claims that this holding was unsupported by any finding of the District Court or by any ascertainable evidence and characterizes it as an independent finding (Pet. 11-14). Not only is this a captious criticism but it represents an inexcusable distortion of the record. Findings 30 and 31 of the District Court unequivocally state that National continuously had officers who lived and maintained their offices in New York. They read (Pet. 53-54a):

> "30. Spyros P. Skouras as President and a co-general manager of National from February, 1932 to November, 1934, and as Executive Vice-President and a co-general manager from 1934 to April, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. His office was also maintained at that address from 1942-1952, during which time he was Chairman of the Board of Directors of National. During all of these periods Mr. Skouras was also a director of National, and resided in New York.
>
> "31. Sidney R. Kent. President of National from November 14, 1934 to March, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. During that period Mr. Kent resided in New York and was also a director of National. Other officers and directors of National continuously maintained their offices and residences in New York."

In the light of these findings what conceivable basis is there for petitioner's assertion (Pet. 20) that the court below fash-

ioned its own finding that respondent's officers were in fact continuously in New York for purposes of the limitations statute? Any such contention is patently unsustainable.

We point to these contentions not only because they are baseless and frivolous but because it is not the function of this Court to examine into the minutiae of the record below. The District Court had all the evidence before it, both testimonial and documentary, and made clear and specific findings. The Court of Appeals had the record in this case before it on three occasions and concluded after "a careful review of the evidence" (Pet. 18a) that the District Court had been right in dismissing the complaints because the evidence in support of the findings was overwhelming and because it was irrefutable that respondent was amenable to process in New York during the relevant period.

Petitioner's effort to create a constitutional issue by urging that the ruling below improperly denied it a jury trial is specious. This Court has considered and defined the function and authority of the trial judge in jury cases in a long line of decisions. As was said in *Patton* v. *Texas and Pacific Railway Co.*, 179 U. S. 658, a federal judge "is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility" (p. 660).

In *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, this Court considered the duties of the court in situations where the evidence admitted of no doubt, saying (p. 343):

> "It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' *Pleasants* v. *Fant*, 22 Wall. 116, 120-121. And where the evidence is 'so overwhelmingly on one side as to

> leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch* v. *Boston*, 101 U. S. 16, 18; *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476, and cases cited; *Herbert* v. *Butler*, 97 U. S. 319, 320. The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned."

See also *Pleasants* v. *Fant*, 22 Wall. 116, 122; *Delaware &c. Railroad* v. *Converse*, 139 U. S. 469, 472; *McGuire* v. *Blount*, 199 U. S. 142, 147-48; *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524; *C. M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 478; and *Gunning* v. *Cooley*, 281 U. S. 90, 94.

Nor is there any conflict in the courts of appeal, where the principle has been succinctly expressed by the court below in *United States* v. *243.22 Acres of Land*, 129 F. (2d) 678 (2nd Cir., 1942), as follows (p. 684):

> ". . . had there been a jury trial of those issues, the judge would have been required to direct a verdict. There is no constitutional right to have twelve men sit idle and functionless in a jury-box."

Thus, the holding of the court below in no way departed from the accepted and usual course of judicial proceedings and its decision is not in conflict with applicable decisions of this Court or with those of other courts of appeal.

2. The Court Below Correctly Held that Respondent Could Have Been Sued in New York Because Respondent Directly and through Its Agents Transacted Business in New York throughout the Relevant Period.

The decision of the court below was predicated upon the overall business activities of the respondent in New York. Those activities are set out in the Findings of the District Court. Prior to 1936 respondent itself directly carried on the substantial business activities found by the District Court. After December, 1935, it continued to carry on many of its business activities directly, but also delegated at that time certain administrative and accounting functions to its agent, National Agency Corporation, a wholly-owned subsidiary which had entered into a contract of agency with respondent on December 3, 1935. (Pltfs.' Exhibit 19, Appellee's Appendix, 146-51a in No. 761). The District Court concluded that National Agency Corporation was respondent's agent within the meaning of Section 4 of the Clayton Act (Conclusion of Law 9, Pet. 61a) and its specific findings reflect the agency functions and activities which that company carried on for respondent in New York pursuant to its contract (Findings 10, 11, 33, 34, 42, 43 and 50; Pet. 39-40a, 54a, 56a, 59a). Such activities were held as a matter of law to be respondent's activities within the meaning of the Clayton Act. In its decision on the re-hearing the court below referred to certain of those findings as being corroborated by documentary evidence which was overwhelming (Pet. 18-19a). There was no dispute with respect to any of such activities.

Petitioner now attacks the holding of the court below in this respect by asserting that, in disregard of corporate entities and by piercing corporate veils, the court improperly ascribed to respondent the activities of National Agency Corporation. To support its contention that this was error, petitioner cites a number of "doing business" cases. It does not, however, deign to mention either Section 4 or Section 12 of the Clay-

ton Act and, significantly, avoids any discussion of cases construing those Sections. Petitioner either misconceives the holdings of the courts below or it has mis-stated them in the hope of raising some factual issues which it contends this Court should resolve. In either event its position is untenable.

Nothing could be plainer than the fact that National Agency after its organization in 1935 was respondent's agent within the meaning of Section 4 of the Clayton Act and that its activities constituted transacting business by respondent within the meaning of Section 12. That was the inescapable holding of both courts below. National Agency had no separate and independent business of its own. As its name implies, it was an agency and service corporation which rendered extensive services for respondent and respondent's theatre-operating subsidiaries (Finding 11, Pet. 40a). It occupied the same premises as respondent and the same individuals were, in the main, officers of the two companies (Finding 10, Pet. 39a).

The District Court, however, did not rest its conclusion that respondent was amenable to suit in New York solely upon the activities of National Agency after the organization of that company. It held that throughout the relevant period respondent itself was present transacting business in New York of a substantial nature and continuously had officers and other agents present in the jurisdiction acting for it and upon whom service could have been had. On the basis of these facts neither of the courts below was required to pierce any so-called "corporate veil" to conclude that respondent could have been sued in New York. There was nothing to pierce.

Petitioner thus has either misconceived or mis-stated the holdings of the courts below so far as they are applicable to respondent and its agent National Agency. The issues here are in no way analogous to those decided in *Cannon Mfg. Co. v. Cudahy Co.*, 267 U. S. 333, or in any of the other cases cited by petitioner (Pet. 22). All the cases upon which petitioner relies

were concerned with questions of *in personam* jurisdiction over corporations in non-federal causes of action. This Court has made it abundantly clear in *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, *United States* v. *Scophony Corp.*, 333 U. S. 795, and *United States* v. *Nat. City Lines*, 334 U. S. 573, that the Clayton Act provisions govern jurisdiction and venue in anti-trust actions. The decisions of this Court in those cases authoritatively establish that the relevant provisions of the Clayton Act were enacted for the express purpose of overcoming the "doing business" and "found" strictures which had been engrafted upon the venue provisions of the Sherman Act. Hence, the cases cited by petitioner, whatever their validity in other types of actions, have no application to anti-trust actions such as the case at bar. Under the standards established in *Eastman, Scophony* and *Nat. City Lines* respondent unquestionably was transacting business in New York both directly and through its agents and could have been sued there. Since respondent could have been sued it is apparent that it was not absent from the state and the statute of limitations continued to run. The complaint was properly dismissed as barred.

3. No Element of Estoppel Precluded Respondent From Establishing the Facts With Respect to Its Business Activities in New York.

So far as New York was concerned, petitioner's evidence in the District Court consisted almost entirely of excerpts from pleadings filed and statements made by respondent in two unrelated actions in the District Court in New York in which respondent was a defendant. It is petitioner's contention that the position taken by respondent in those cases was inconsistent with that taken by it at the trial and that respondent was thus precluded from establishing the actual facts as to its activities in New York.

The two actions in which these so-called inconsistent statements were made were instituted in 1938 and 1941, respec-

tively, and were subsequent to the relevant six-year period here involved.* In one case, *United States* v. *Paramount Pictures Inc.*, respondent formally denied in its answer, filed in 1939, that it had a place of business in New York and alleged that its place of business was in New Jersey (obviously an immaterial issue in an anti-trust action instituted by the Government). Respondent appeared and defended on the merits in that action and no issue was ever raised or litigated as to its place of business. In the other case, *Hillside Amusement Company* v. *Warner Bros. Pictures, Inc.*, respondent, as found by the District Court, raised the jurisdictional issue in 1941 because of tax considerations. Later, upon advice of counsel that it could not successfully contest jurisdiction in New York, respondent withdrew its defense, entered a general appearance, answered and defended the action (Finding 47, Pet. 57-58a).

The District Court rejected petitioner's theory of preclusion or estoppel as baseless, saying (Pet. 32a):

> "It cannot be too strongly emphasized that the facts are determinative of the issue whether the defendant was doing business or 'found' during the times in question. Certainly there is no statutory act which precludes or estops the defendant from maintaining its present position. Nor indeed has the plaintiff been able to show that an equitable estoppel should be charged against the defendant. It may be observed in this connection that there is no showing by the plaintiffs that the plaintiff was prejudiced by the legal defenses which the defendant may have raised in other actions to which the plaintiffs were not parties. I repeat: the facts themselves are determinative of the issue."

Judge Learned Hand, in his opinion in the court below, also could find no warrant for petitioner's theory and held that it was "plainly without foundation" (Pet. 8a).

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*It was conceded that the six-year New York statute, if not tolled, would have barred petitioner's action on December 8, 1937.

Petitioner has not pointed to any fact upon which any claim of preclusion or estoppel could be predicated. There is no claim that petitioner was a party or privy to any party in either action in which the claimed inconsistent statements were made. There is no assertion that petitioner ever changed its position in reliance upon any statements made by respondent to its detriment, or otherwise, or that petitioner even so much as knew of the cases in which respondent's statements were made. Moreover, respondent's amenability to suit in New York was never litigated and no judgment was ever rendered to the effect that it was not amenable to suit in New York.

With reference to the *Hillside* case, *supra*, the District Court specifically found that petitioner was not and could not have been affected by any proceedings in that case since respondent's statements were not made until after the New York statute had already barred petitioner's action. This appears in Finding 48 (Pet. 58a):

> "48. Neither of the plaintiffs in these cases was a party to the *Hillside* case. There was no evidence that any position taken or pleading filed by National in that case was known to or relied upon by either plaintiff in these cases. There was no evidence that plaintiffs were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Hillside* case. Furthermore, in view of the findings herein made, the activities of National in New York were such that the Statute of Limitations of New York had run against the plaintiff Gumbiner Theatrical Enterprises prior to the filing by National of any papers in the *Hillside* case."

The District Court further found that in the relevant six-year period here involved respondent had been sued in another

matter in New York in 1934 and had appeared and defended (Finding 49, Pet. 58-59a).

All of the cases cited and relied upon by petitioner (Pet. 23-24) were concerned with the well-established doctrines of equitable estoppel and estoppel by judgment. Petitioner has not made any attempt to relate the holdings in those cases to the facts in this case because the record below shows that no element of estoppel exists. Instead, petitioner has taken isolated phrases out of the context of the opinions in the cases cited and has attempted to tailor a theory based thereon.

We submit that neither this Court nor any other court has ever rendered a decision which has applied or supported petitioner's theory in a factual situation such as that present here. For example, and as indicating that all such cases rest upon application of the principles of estoppel, we refer to *Sturm* v. *Boker*, 150 U. S. 312, cited by petitioner (Pet. 24). There this Court adverted to the rules of estoppel and held that no showing had been made as to their applicability because no reliance had been placed upon the statements in question. Holding that there was no estoppel, this Court said (pp. 335-36):

> "This language did not mislead or induce either the defendants or the insurance companies to alter or change their position in any respect whatever, nor influence their conduct in any way."

So here. This Court in *Sturm* v. *Boker* then went on to note that if there were any estoppel it would have been against the party claiming it. As to this aspect of the case at bar, we respectfully direct this Court's attention to Findings 14-23 of the District Court, set out in the Appendix to the petition at pages 46-50a.

The facts below show that no element of an equitable estoppel or estoppel by judgment was or could have been present in this case. To summarize the indisputable facts established below, (a) the alleged inconsistent position was

never successfully maintained nor, indeed, was it ever litigated; (b) no judgment was ever rendered that respondent was not amenable to suit in New York; (c) the alleged positions taken in other proceedings were not clearly inconsistent, because in both such cases respondent appeared, answered and submitted to the jurisdiction; (d) petitioner was not a party or privy to any party to either of such actions; (e) petitioner was not and could not have been misled by any statement or claim made by respondent and did not change its position as a result thereof; and (f) no injustice vis à vis petitioner resulted from respondent's proof of the actual facts with respect to its business activities in New York.

Under these circumstances the District Court properly admitted respondent's evidence. Petitioner's contentions are devoid of merit.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case should be denied.

Respectfully submitted,

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April 3, 1958.

APPENDIX TO RESPONDENT'S BRIEF

Pertinent Statutes

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22, reads:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Section 19 of the New York Civil Practice Act, so far as pertinent, reads as follows:

> "**Effect of defendant's absence from state or residence under false name.** If, when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months* or more, or if, without the knowledge of the person entitled to

*Prior to 1943 the provision was "one year" instead of "four months".

maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply in either of the following cases:

* * *

"2. While a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served."